



# ESSENTIALS OF BUSINESS LAW

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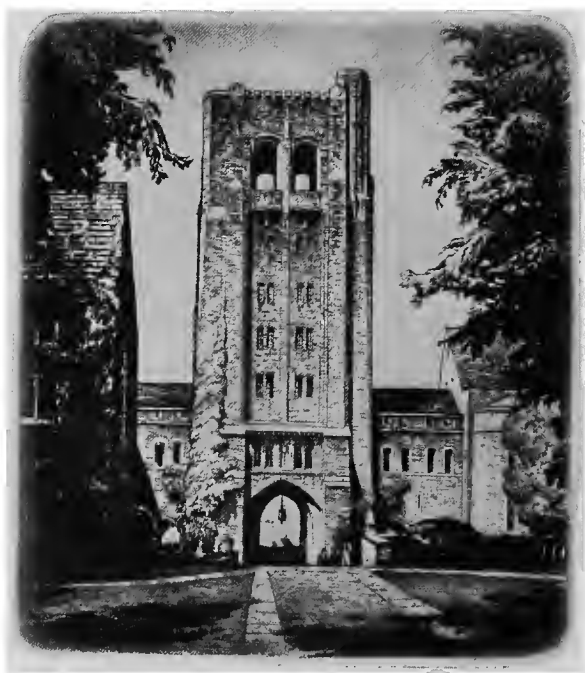
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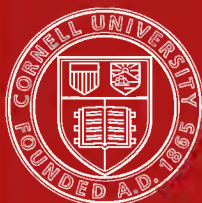
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# TWENTIETH CENTURY TEXT-BOOKS

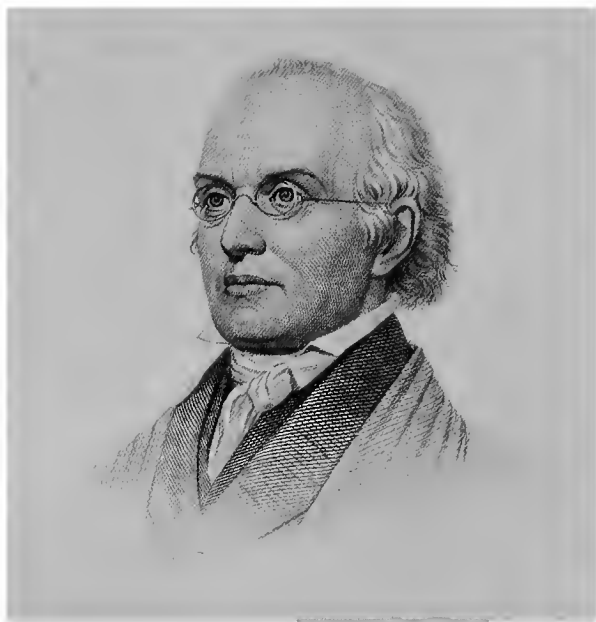
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*Joseph Story*



TWENTIETH CENTURY TEXT-BOOKS

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# THE ESSENTIALS OF BUSINESS LAW

BY

ARION  
FRANCIS M. BURDICK

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## P R E F A C E

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THIS book has not been written for lawyers, nor for professional students of the law, but for boys and girls in our secondary schools. Its purpose is to show how the rules of law, governing ordinary business transactions, have been developed, and to tell what they are. Technical law terms have been discarded as far as possible. When they have been used, care has been taken to explain and illustrate their meaning, so as to render them easily intelligible to every attentive student.

The author believes that the average high-school boy or girl can acquire an accurate knowledge of the essential principles of business law if these are set forth in clear, lucid, popular language. He has endeavored so to present them in the following pages. He has no idea that a mastery of this book will fit the student for a bar examination, or will enable him to be his own lawyer. He has the conviction, however, that it will give the student a fair acquaintance with those legal principles and ideas which are involved in ordinary business affairs, and that it will help him to know when he ought to consult a lawyer, in order to avoid business pitfalls.

It is hoped that the book will disclose to the reader the meaning of many legal terms which are constantly thrust

before him, in conversation and in the newspapers; that it will show him how to make, indorse, and use checks and other forms of negotiable paper; that it will teach him his rights against hotel-keepers, common carriers, and many others, as well as give him much useful information about the purchase and sale, the transfer and conveyance of land and of personal property.

FRANCIS M. BURDICK.

COLUMBIA UNIVERSITY.

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LORD MANSFIELD.

# ESSENTIALS OF BUSINESS LAW

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## CHAPTER I

### INTRODUCTORY

#### THE NATURE AND ORIGIN OF MUNICIPAL LAW

1. **The study of municipal law.**—In this book we are to consider those legal rules of civil conduct that relate especially to the business transactions of our day. We shall not survey in detail the history of municipal law; and yet a glance at its evolution may prove helpful to the student, by enabling him to consider the subject from the right point of view.

We have followed Blackstone<sup>1</sup> and Kent<sup>2</sup> in using the term “municipal law” to designate the *body of legal rules*, or the system of social order, which is *established and enforced by the state*. The term itself contains quite a bit of history, for “municipal” carries us back to the time

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<sup>1</sup> Sir William Blackstone's Commentaries on the Laws of England, in Four Books, were published during the years 1765 to 1769. They contain the substance of lectures delivered by the author while Vinerian Professor of Law in Oxford University. One of his harshest critics declared it was “he who first of all institutional writers taught jurisprudence to speak the language of the scholar and the gentleman.” The Commentaries are a legal classic.

<sup>2</sup> Chancellor Kent's Commentaries on American Law, in four volumes, were the outgrowth of lectures delivered at Columbia College. They were published from 1826 to 1830, and are still deservedly popular with the legal profession.

when the *municipium* (the free city) was the typical state. Carthage, Athens, Rome, were examples of city states among the ancients, as Venice, Florence, Hamburg, Lübeck, Bremen, were during the middle ages, and indeed until quite recent times.

## 2. Municipal law and the theory of a social compact.—

It was a favorite theory about two centuries ago that all rules of civil conduct had their origin in what was termed an "original contract" or "social compact." According to this theory, especially as it was set forth by Rousseau and writers of his school, we may picture the evolution of municipal law somewhat as follows:

Far back in the past, during the golden age<sup>1</sup> of mankind, our ancestors gathered in a great plain, and there came to an agreement to live in political communities. Upon making this change from *a state of nature*, where every one had all the land and goods he needed, as well as absolute freedom of action, to *a state of organized society*, where each was obliged to surrender many of his natural rights, it became necessary to adopt forms of government as well as rules of conduct for the individual. The political and legal systems thus set up were perfect, for they conformed in every respect to an *ideal law of nature*. As mankind degenerated, and passed from that golden age through the ages of silver, of brass, and of iron, forms of government and rules of law became corrupted also. Kings and aris-

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<sup>1</sup> Classical mythology, according to the poet Hesiod, divided the life of the human race into four periods. The golden age extended through the reign of Saturn, and was a period of perfect innocence, happiness, and simplicity, when the earth yielded spontaneously everything that was desirable for mankind. This was followed by the silver age, in which mankind became wicked and was obliged to toil for the necessities of life. Next was the brazen age, an epoch of war and violence. And finally the iron age, or that in which Hesiod lived, when justice and piety were thought to have disappeared from the earth.

tocrats stole away the liberties of the people, and professional lawyers converted a body of clear and simple rules into a tangled web of obscure doctrines and technical court procedure. In Rousseau's favorite phrase, "Man is born free; and he is everywhere in chains." He would have us believe that the evolution of law had been downward, not upward; from the reasonable to the unreasonable; from the good to the bad.

3. **The social-compact theory exploded.**—But this theory, that political and legal systems may be traced to their source in an "original contract" between the early members of the human race, has long been exploded. It rested solely upon speculation, and a careful study of history has shown that the conjecture was as erroneous as it was brilliant. History gives us no picture of a golden age of our race. It has no record of a primitive community, with simple and perfect laws. On the contrary, it shows our human ancestors in a state of savagery where "might makes right." Their code of conduct was that of Rob Roy, as sung by Wordsworth:

. . . The good old rule  
Sufficeth them, the simple plan  
That they should take who have the power,  
And they should keep who can.

Such a rule is simple, undoubtedly. It is natural, too, for it is borrowed from the "creatures of flood and field." But it is very far removed from the natural law—the ideal system of rules of human conduct—which Rousseau and his followers thought was enjoyed by primitive man. Indeed, it was not law at all in its modern sense. It was not a rule of action established by the state, which the individual was bound to obey. Rob Roy was a lawless man. Lawless, too, is the human savage everywhere in his primitive estate.

**4. Law develops as man improves his condition.**—As man advances from the savage state in which we find him at the dawn of profane history; as the members of a clan, a tribe, or other primitive community, increase in numbers; as their tastes and talents become diversified, and as they begin to accumulate various forms of property, the need of laws makes itself felt. Without them a man can not be secure in the possession of the fruits of his labor or skill. He may have made a bow and arrow, a spear, or a canoe; he may have captured a valuable animal or a slave. How shall he keep his property from the stronger arm of his neighbor? Only when the law of the land comes to his assistance and throws over him its protecting shield.

But the development of that law was a slow, hard, tedious process for our early ancestors. We can not undertake to tell here the whole story of that evolution. All we shall hope to do is to trace in a very sketchy way the outlines of its course, as they have been set forth by writers on Roman law. We refer to this particular system of law because its history covers a period of a thousand years.

**5. Law was not invented, but grew.**—One of the first things made clear by that history is that rules of law were not thought out and put into set forms of words by the founders of Rome. Those men, whether they were the mythical Romulus and Remus, or whether they were the members of an ordinary village community in ancient Italy, were accustomed to settle their disputes by a fight. He that had the best spear, the strongest arm, and the greatest skill in combat, invariably had the law on his side. But as the little city grew, and quarrels over property became more frequent, this method of settling them was felt to be wasteful of human life and altogether unsatisfactory. Accordingly the practise grew up of referring these disputes to the king, or to some officer chosen to act as arbitrator.



A brief description of the oldest form of Roman lawsuits will show how closely it was connected with the physical combat for which it was a substitute. It opened with a mimic fight. The plaintiff, as we should call him, appeared before the magistrate, seized with one hand the article over which the dispute had arisen, and with the other laid upon it a rod, which was used in the place of a spear, and declared the property was his. The defendant did and said the same thing. Here we have the claimants grasping a piece of property and ready to try title to it by physical combat. Thereupon the magistrate commanded both to let go their hold. They obeyed, and then each stated the grounds upon which he claimed the article in question, after which the evidence was taken and the case decided.

The decision in those far-away times would not be based, however, upon formal rules stating how property could be acquired and held, as a similar case would have been decided five centuries later at Rome, or as it would be decided with us to-day. There were no such rules. The arbitrator, or magistrate, after listening to the parties, would decide the dispute as he saw fit.

In those early ages it appears to have been supposed that the king or magistrate had secret sources of knowledge and wisdom upon which he could draw, to enable him to render right judgments. Accordingly, we find Homer calling such judgments "Themistes," as if they were the promptings or inspirations of the goddess Themis.

**6. Judicial decisions gave rise to legal rules.**—This practise of having disputes settled, not by physical combat between the disputants, but by state officials, resulted, as we should expect it would result, in the formulation of rules intended to prevent disputes. One of the earliest of these legal rules related to the manner of transferring title to property. Let us stop a moment to consider it, and especially to note its harsh and technical character.

**7. Conveyance with copper and scales.**—Suppose an ancient Roman wished to buy a horse of his neighbor. How could he get a good title? Not in the simple way in which a buyer would get title now. It was not enough for him and the seller to agree upon the terms of sale, nor even for him to pay the price and take the horse. He was required to go through a carefully prescribed and cumbrous ceremonial known as “mancipation.” Five Roman citizens must be summoned as witnesses, and another citizen must attend with a pair of scales. The seller must then bring forward the horse, and the buyer must produce the rough copper pieces that served as money. The man with the scales weighed the money, and the horse was then delivered to the buyer with certain prescribed words and gestures, while the money was handed to the seller. If any part of this ceremony was omitted, the buyer’s title was defective and the seller could retake the horse. On the other hand, if all the forms were accurately observed, the transaction was absolutely binding on both parties. The buyer could not get back any of his money, however badly he had been cheated by the seller.

Such a rule of law was, of course, a serious hindrance to trade; and as soon as commercial activity sprang up it had to be modified. Some relief was obtained by confining it to certain forms of property—to land, slaves, horses, and oxen—as these were the things most valuable to the early Romans. Other kinds of property were allowed to be sold and transferred in accordance with usages that had grown up among business men. In this way, grain, fruit, clothing, jewelry—indeed, most of the things that formed the staples of trade—were exempted from the technical and cumbersome ceremonial of “mancipation,” and the law made the title to them valid when they were delivered by the seller to the buyer pursuant to an agreement between them. Later, the advantages of this simpler rule led to an abolition of the

older one by legislation; and thereafter all kinds of property could be validly sold and transferred without any formal ceremony.

**8. The Roman law of contracts.**—If we turn from the rules regulating the acquisition and transfer of property to those governing contracts, we shall find a similar advance from excessive technicality to simplicity; from rigid formalism and ceremony to mutual assent. When we come to deal with the English law of contract, we shall see that, in the main, it is characterized by common sense and sound morality. Now and then we shall come across survivals from an earlier age of technicality and formalism; but we shall find that on the whole the English law seeks to give effect to the honest and deliberate intentions of parties to business transactions.

The primitive law of contract at Rome was of a different character. It recognized but one form—that known as the verbal contract—and this could be entered into only by the use of a particular word. One party must use the word *spondes?* (do you undertake?) and the other must use *spondeo* (I do undertake). If this word was not used, or if the conversation did not take the form of a question by the promisee and an immediate answer by the promisor, there was no contract, however clear might be the evidence that the parties had made a fair and deliberate agreement.

Such a state of the law was tolerable only among a rude people whose business transactions were few. With the growth of trade at Rome, other forms of contract gained recognition, until finally by the Roman law the fair and deliberate agreements of persons were enforced without respect to the form in which they were made. This development of the Roman law of contract from the formal stipulation by a prescribed question and answer to the consensual agreements, in which the mutual assent of the parties was the vital element, took place in response to the

necessities of business and to the demands of the moral sense of the community. These have always and everywhere exerted a powerful influence over the development of law.

**9. Law is common sense, but clothed in technical forms.**

—While modern law is far less technical and formal, and has far more of good sense and sound morality than the law of our early ancestors, it is not a body of rules that can be set forth without the use of technical terms. Although the highway of the law has improved with the progress of mankind from savagery to civilization, it is not yet so plain and straight that “the wayfaring men, though fools, shall not err therein.” Its course, at times, is still tortuous and rugged.

If the student is disposed to think that some parts of the law explained in the following pages are dry and hard to understand because of their technicality or subtlety, let him take to heart these words of Sir Henry Maine: “If I were asked to give a definition of law to persons quite ignorant of it—I mean, of course, a rough and popular, not a scientific definition or description—I should say law is common sense. Of course that is true only with very considerable reservations and abatements. It is not absolutely true even in England, where law has been cultivated for centuries by the flower of the national intellect—an intellect wedded above all things to common sense. But still, with all abatements and reservations, the proposition that law is common sense is much truer than any one looking at the subject from outside can possibly conceive. What conceals this from the layman is the fact that law, being not only a science to be learned but an art to be applied, has, like all arts, to be thrown into technical forms. Technicalities are absolutely indispensable to lawyers, just as the ideas of form, proportion, and color have to be thrown into a technical shape before they can give birth to painting and

sculpture. A lawyer can not do without technical rules, any more than a sculptor or a painter. Still, after all, the grand criterion of legal soundness is common sense; and if you are inclined to employ an argument, to draw an inference, or to give an opinion that does not satisfy this test, which is out of harmony with experience and with the practical facts of life, I do not say reject it absolutely, but strongly suspect it, and be sure that the presumption is heavily against it."

## CHAPTER II

### THE LAW MERCHANT AND THE COMMON LAW

#### § 1. THE LAW MERCHANT

10. **The sources of modern business law are twofold.**—While most of the legal rules observed by business men in this country to-day are derived from the common law of England, some of them are traceable to a different source, having their origin in the law merchant. Three hundred years ago these two sets of rules, which have contributed to the formation of modern business law, were quite distinct and separate. Many of their principles were different, if not antagonistic. They were administered by different courts, whose judges were differently educated and whose methods of procedure were strikingly unlike.

11. **Their differences illustrated.**—Perhaps the nature and extent of the differences between these two bodies of law may be made more intelligible by an illustration.

Suppose, during the sixteenth century, A and B were partners in buying and selling wool. They attended a great fair at Winchester, England, made contracts for the purchase of wool, and A died. Suppose, at the same time, C and D were joint owners of a sheep-farm near Winchester, of a flock of sheep, and of a quantity of wool, recently sheared from the sheep, and that C died. The legal rights of B in the property owned by him and A at the latter's death would have been very different from those of D in the property owned by him and C at C's death, and those

rights would have been passed upon by wholly different courts.

B's interests in the partnership property as it stood at A's death would have been determined by the law merchant as administered by the staple court—that is, by the merchants' court of Winchester; while D's interests in the farm, the sheep, and the wool jointly owned by him and C at the latter's death would have been determined by the common law as administered by the regular judicial tribunals of the realm.

**12. Survivorship at common law.**—It was a rule of the common law of England that upon the death of one of two joint owners the entire property belonged to the survivor. In other words, the share of the one dying passed to the one surviving, who became the sole and exclusive owner. Accordingly, upon C's death, D would become sole owner of the farm, the sheep, and the wool.

**13. No survivorship between partners.**—The law merchant, however, did not recognize this right of survivorship between partners. After the death of A, therefore, B's interest in the partnership property would be neither greater nor smaller than before. He would have the right, indeed, to settle the affairs of the firm; but, as soon as they were settled, he would be bound to pay over to A's personal representatives (that is, his executors, if he left a will, or his administrators, if he died without a will) his share of the partnership property.

**14. Effect of death on outstanding contracts.**—Again, in our supposed case, A and B as partners had entered into contracts for the purchase of wool. Under the law merchant, the death of A would not relieve his estate from liability on such contracts. If B received the wool and refused to pay for it, the seller would not be limited to a claim against B; he would have a legal right to call upon A's executors or administrators for the price of the wool.

On the other hand, had C and D bought hay on credit for their sheep, the common law would have cast the whole burden of the debt on D at C's death. Neither the creditor, who had sold the hay, nor D, even after paying the entire price, could call on C's estate for a farthing.

15. **Merchants' courts.**—Not only did the rules of the law merchant differ in many important respects from those of the common law, as shown in the foregoing illustrations, but the courts which administered this law formed a judicial system which was entirely distinct from that of the courts of common law and of equity, whose jurisdiction extended throughout the kingdom. If we may trust the preamble of a statute of Edward III, enacted in 1353, merchants' courts in England were intended "to give courage to merchant strangers to come with their wares and merchandise into the realm."<sup>1</sup>

Evidently these traders were unwilling to come if they were to be subjected to the rules of the English common law and compelled to adjust their disputes in the common-law courts, already notorious for their technical and dilatory procedure. They would come only upon condition that special courts were organized, which should sit in connection with the fairs or markets where these merchants transacted business, and should do speedy justice "*according to the*

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<sup>1</sup> *The Statute of the Staple*, 27 Ed. III, c. 2. This is a very important and interesting act of Parliament—one which the student will do well to read if he has access to the English Statutes at Large. It named the towns in which the *staple*, i. e., the *authorized market* of wools, leather, woolens, and lead should be held; it regulated the conduct of such markets, and provided for merchants' courts in connection with them. The staple or market towns were Newcastle-upon-Tyne, York, Lincoln, Norwich, Westminster, Canterbury, Chichester, Winchester, Bristol, Kaermerdyn, Devylen, Waterford, Cork, and Drogheda.



*law of the staple,*" or of "the merchant, and not of the common law of the land, nor of the usages of cities, boroughs, or towns" where the staple, or market, or fair was held.

**16. Judges and juries of merchants' courts.**—By the Statute of the Staple it was provided that the common-law judges should not have jurisdiction over the business transactions of these merchants, but "that the mayors and constables of the staple shall have jurisdiction and cognizance within the towns where the staples shall be, of people, and of all manner of things touching the staple."

It was provided, further, that in every staple town "a mayor, good, lawful, and sufficient, shall be made and established, having knowledge of the law merchant, to govern the staple and do right to every man after the laws aforesaid, without favor, sparing, or grief-doing to any." Also that there shall be two constables in each staple or market town, "to do that pertaineth to their office as in other staples is accustomed." These mayors and constables were to be "chosen by the commonalty (i. e., the whole body) of the merchants of the said places, as well of strangers as of denizens." If a jury was to be employed in any case, it was to consist of merchants only. Merchants "coming to the said staples because of merchandise" were to be sworn to submit their controversies to the mayor and constables and to "maintain as much as in them is the staple and the laws and usages of the same."

**17. These courts called pepoudrous.**—Many, perhaps most, of the merchants doing business in these market towns were non-residents. It was very important to them, therefore, that lawsuits in which they became engaged should be disposed of quickly. Accordingly we find the statute declaring that "speedy right be done to merchants from day to day and from hour to hour, according to the laws used in such staples before this time holden elsewhere

at all times, so that the merchants be not by malice delayed for default of speedy remedy." *Because of the rapidity with which these merchants' courts despatched business, they were styled courts pepoudrous.* Lord Coke, writing two centuries and a half after the enactment of the statute of the staple, tells us that a court pepoudrous "is incident to every fair or market, because that for contracts and injuries done concerning the fair or market there shall be as speedy justice done for the advance of trade and traffic *as the dust can fall from the feet*, the proceeding there being from hour to hour." In other words, these merchants' courts were always open, always ready to redress business grievances, and to redress them quickly; so quickly, indeed, that justice might be said to be administered while the dust fell from the feet of the litigants.

**18. Modern ignorance of the ancient law merchant.—**

It is apparent that the statute of the staple secured to merchants prompt adjustment of disputes in accordance with the rules of the law merchant. We have to confess, however, that modern knowledge of those rules is very vague. No complete and formal record was kept of the judicial proceedings of the merchants', or staple, or pepoudrous courts. No formal reports of their decisions were written out or published. No trained and accurate lawyers took notes of these decisions, or reduced them to the form of a systematic digest; nor, apparently, did any writer think of setting forth this body of law in a scientific manner. Consequently we find learned and indefatigable legal students, like the late Lord Blackburn, declaring that the history of the law merchant in England is most obscure.

The suggestion has been made by Pollock and Maitland, in their history of English law, that if we could recover the ancient law merchant, we would find it "chiefly to consist of what would now be called rules of evidence, rules about the proof to be given of sales and other contracts, rules as

to the legal value to be given to the tally and the God's-penny." <sup>1</sup>

19. **Fragments of the law merchant in sea codes.**—It is true that some of the rules of this legal system have come down to us in various codes of sea laws, such as the laws of Oleron and Wisby, but these were limited almost exclusively to maritime transactions, to the navigation of ships, and to contracts relating to shipping interests. It is also true that treatises on the law merchant were published as early as the fourteenth century; but these were informal and unsystematic collections of the usages and customs of merchants—laymen's desultory discussions of their practices in business matters, rather than lawyers' statements of legal rules or judicial decisions. Certainly no lawyer of to-day would undertake the task of formulating from these books anything like a code of the law merchant.

20. **The ancient law merchant was international.**—A comparison of these books shows, however, that the usages and customs of merchants were the same throughout Europe. Mercantile contracts were entered into in the same way in Italy as in England; in Germany as in France and Spain. They were proved by the same evidence, and disputes arising from them were settled by courts similarly constituted—that is, by courts of merchants whose judges were selected because of their knowledge of the law merchant. Accordingly this body of rules and usages was often spoken of as "a branch of the law of nations," or as the "law of nature," or as the "law universal of the world."

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<sup>1</sup> A primitive method of keeping accounts was by cutting notches in two pieces of wood placed together, one piece or tally being kept by the creditor, while the other was kept by the debtor. The God's-penny was a penny given by one party to the other to bind a contract. According to Fleta, the law merchant compelled a party who broke a contract which had been bound by the God's-penny to forfeit five shillings for every farthing, or a pound for a penny.

**21. Difficulty in applying this law of nature.**—The fact that this was a “natural” system of law did not insure an easy solution of every dispute.

Of course, when a common-law court, like that of the King’s Bench under Edward II, is called on to apply a rule of this “law of nature” failure is to be expected. Its members, trained as they have been in an artificial, a technical, a perverted system of law, will be unable to say what is according to nature and what is not; and they will be forced to summon merchants—twelve of them selected from four cities are none too many—to testify what the rule in question is. But not infrequently even a merchants’ court is sorely puzzled to determine just what this “law of nature” requires in a particular controversy, and the case “must be respited until it shall be more thoroughly discussed by the merchants of the various commonalties and others convoked in full court.”

Still, even in such a case, a decision would be reached much more quickly in a merchants’ court than in a court of common law or of chancery. During a fair, or while ships were lying in port, the merchants’ court was always open for “plaints and pleas” of those doing business at the fair or interested in the ships temporarily in port. Summary proceedings, quick settlement of disputes rather than ideal justice, was the motto of these courts. This demand of the mercantile classes for the speedy adjustment of controversies which made merchants’ courts so popular centuries ago, has never ceased. In recent years it has led the English courts of common law to provide a special tribunal for the trial of commercial cases, in order that these might be brought to trial and decided promptly.

**22. Decay of merchants’ courts.**—During the seventeenth century, the merchants’ courts and the various similar courts which administered the law merchant in England died out and disappeared. A part of this law merchant,

especially those rules which had been embodied in the sea codes to which we have referred, continued to be administered by the English Court of Admiralty; but this tribunal, too, under the vigorous assaults of the common-law bench and bar, led by Lord Coke, was forced to yield much of its jurisdiction and dignity to the common-law courts.

**23. Merchants' courts in America.**—While these courts were dying out in England, they gained a new lease of life in some of the American colonies. For example, New York passed an act in 1692 “for the Setling of ffairs’ and Marquets’ in each respective citty and County throughout the Province,” which authorized the governor or ruler of each fair “to have and to hold a court of Pypowder together with liberties and free customs to such appertaining,” and to hear “from day to day and hour to hour all plaints and pleas of a court of Pypowder, together with summons, attachments, arrests, issues, fines, redemptions, and commodities and other rights whatsoever to the same courts of Pypowder anyway appertaining.” As late as 1773 the above provisions were extended to new counties and to additional fairs or markets authorized in the older parts of the colony.

That these courts were held by magistrates who were learned in the ancient law merchant is not probable. The governors and rulers of the colonial pypowder courts dispensed justice promptly, without doubt, but they dispensed it in accordance with their sense of what was fair between man and man, not in accordance with any established system of law. We may well believe that their legal training and their judicial proceedings were not those of the courts pepoudrous described by Lord Coke; but that they were far more like those of an early Quaker governor of New Jersey, Thomas Olive, whose seat of justice was a stump in his meadow and who was innocent of any knowledge of technical law.

**24. The law merchant in common-law courts. Second stage in its development.**—With the decay of merchants' courts and kindred tribunals, the law merchant did not wholly disappear, although it ceased to exist as a well-defined body of legal rules distinct from those of the common law. Some of its rules found their way into the common-law courts, and were spoken of frequently by common-law judges as the law merchant, but they were not treated as a part of the general law of the land; rather were they looked upon as the trade customs of a limited class—the merchants—and as binding on that class only. Even a merchant could not avail himself of one of these customs unless he pleaded and proved its existence and persuaded the common-law judge that it was a proper one to enforce. For example, it appears to have been necessary, until near the close of the seventeenth century, for the indorsee of a bill of exchange,<sup>1</sup> in order to recover in a suit against an acceptor, to state and prove that the acceptor was a merchant.

Most of the judges looked upon these mercantile usages with favor, and were disposed to give effect to them whenever they could. Occasionally, however, a judge arose who held a different attitude toward them. The most notable of these was Lord Holt, chief justice of the King's Bench from 1689 to 1709. During the latter part of the seventeenth century promissory notes<sup>2</sup> were introduced into England and passed as freely among merchants and bankers as did bills of exchange. When, however, holders of these notes undertook to sue upon them, as they had been accustomed to sue upon bills of exchange, alleging that they were negotiable by the usage and custom of merchants,

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<sup>1</sup> For the definition of a bill of exchange, and for an account of the rights and liabilities of the parties to a bill, see Chap. VIII, *infra*.

<sup>2</sup> See Chap. VIII, *infra*.

Lord Holt refused to recognize any such mercantile usage. In the language of the reporter of the leading case on this subject, the chief justice "was with all his strength against this action, and said that this note could not be a bill of exchange; that the maintaining of these actions upon such notes were innovations upon the rules of the common law, which innovations were invented in Lombard Street, and which attempted in these matters of bills of exchange to give laws to Westminster Hall; that the continuing to declare upon these notes upon the custom of merchants proceeded from obstinacy and opinionativeness, since he had always expressed his opinion against them."

**25. Parliament backs the merchants.**—But the mercantile classes, represented by the bankers and merchants of Lombard Street, were not to be balked of their purpose even by a great chief justice of the King's Bench. They continued to use and to sue upon these notes as negotiable instruments; and when a deadlock seemed imminent between the obstinate and opinionative merchants and bankers on the one hand, and the equally opinionative and obstinate chief justice on the other, Parliament intervened, and by the statute of 3 and 4 Anne, chapter 9, in 1704, settled the controversy in favor of Lombard Street.

Chief-Justice Cockburn, in 1875, reviewing this conflict, did not hesitate to call Lord Holt's view of this matter a narrow-minded one, and to declare that his decisions, adverse to the mercantile usage in question, were not acceptable to the legal profession nor to the business classes.

**26. Third stage in the development of the law merchant.**—This began under the chief justiceship of Lord Mansfield, which extended from 1756 to 1788. During the preceding century and a half, as was stated above, merchants' courts had died out, and the law merchant had taken on a new phase. When a case involving mercantile usages

came before a common-law court, the existence and nature of those usages were left to a jury together with all the facts of the case. No attempt was made by the court to discover and expound the legal principle underlying particular usages, and but little progress was made in building up a system of mercantile law to take the place of that which had been administered by the merchants' courts.

With this condition of the law merchant in England, Lord Mansfield was dissatisfied, and he devoted his great abilities to its improvement. His thorough knowledge of the Roman law, especially in its modified form in Scotland, saved him from the narrow partizanship for the common law, which, as we have seen, distinguished Lord Holt. He was not averse to innovations upon the common law, nor did he resent the attempts of Lombard Street bankers and merchants to make law for themselves and for those dealing with them. On the other hand, he delighted in cooperating with Lombard Street—which is but another name for the business men of London—in developing a body of legal rules which should be free from many of the technicalities of the common law, and whose principles should be so broad and sound and just as to commend themselves to all courts in all countries. Accordingly, when a case involving the usages of merchants came before him, he sought to consider not only what those usages were, but the legal principle underlying them.

**27. Lord Mansfield's methods.**—We are told by Lord Campbell, in his life of Lord Mansfield, that the latter “reared a body of special jurymen at Guildhall, who were generally returned (that is, were summoned and sat as jurors) on all commercial cases to be tried there. He was on terms of familiar intercourse with them, not only conversing freely with them in court, but inviting them to dine with him. From them he learned the usages of trade, and in return he took great pains in explaining to



them the principles of jurisprudence by which they were to be guided."

The diverse sources of these principles are disclosed in many of his important opinions. Mr. Scrutton has cited as an example Lord Mansfield's "great judgment in *Luke vs. Lyde*,<sup>1</sup> which raised the question of the freight due for goods lost at sea. He cited the Roman Pandects, the *Consolato del Mare*, the laws of Wisby and Oleron, two English and two foreign mercantile writers, and the French *Ordonnances*, and deduced from them the principle which has since been part of the law of England." So rapid was the development of the modern law merchant, during Lord Mansfield's chief justiceship, that one of his younger associates and disciples, Mr. Justice Buller, did not hesitate to call him "the founder of the commercial law of England." That he is entitled to this name does not admit of a doubt. It was he who won for the law merchant a recognized place in English jurisprudence.

**28. Fourth stage in the development of the law merchant.**—Still this branch of the law has not only grown since Lord Mansfield's time, but its relation to other branches of the law has undergone a change. That great jurist was accustomed to declare that "mercantile law is not the law of a particular country, but the law of all nations." His conception of it was as a body of legal rules to be applied and enforced by English courts, but yet distinct and separate from the common law of England. During the century and more since his death the tendency has been toward an amalgamation of the rules of the law merchant with those of the common law. The two are no

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<sup>1</sup> Decided in 1759, and reported in 2 Burrows, 883. The decision was that in case of a loss at sea, freight must be paid only in proportion to the goods saved, and the part of the voyage which was performed.

longer distinct systems. Each has been modified by the other, and lost its separate identity. Together they constitute the unwritten law of English-speaking countries.

**29. Summary: Four meanings of "law merchant."**—From the foregoing sketch it appears that the term "law merchant" bears at least four distinct significations in English jurisprudence. (1) Originally it meant a body of rules relating to mercantile contracts and transactions, founded upon the usages of merchants, known particularly to merchants, and administered by courts of merchants. (2) After these special courts died out the term was applied to those mercantile customs which the regular judicial tribunals were willing to enforce in cases growing out of commercial disputes. These customs were not law, in the proper sense of that term, but were elements in mercantile transactions to be taken into account in each case by the jury and the court. (3) The third signification originated with Lord Mansfield, and was employed at times by Mr. Justice Story. In this sense, the law merchant meant a body of legal rules, free from the peculiarities and technicalities of the municipal law of any one country, so reasonable in their nature and so broad in their scope as to be law everywhere. (4) Still a fourth and less definite signification attaches to the term at present. It is not employed to mark off a distinct body of legal rules from all others; nor does it distinguish one set of business usages from all others; nor does it mean that the rules falling under this title are accepted everywhere as law; but it is used to designate in a loose and popular, rather than in a scientific manner, those branches of law which have been modified to a considerable extent by the usages of merchants, such as the law of insurance, of partnership, of negotiable paper, of bailments, of sales.

## § 2. THE COMMON LAW

30. **Various significations of the term.**—In our account of the law merchant we have referred frequently to the common law. Let us consider now the different senses in which the term is employed, and trace very briefly the history of this system of legal rules.

“In its largest sense,” says Sir Frederick Pollock, “it means the whole body of legal principle and usage which is common to all parts of England, and now to all jurisdictions whose law is of English origin.” When used in this sense, it is contrasted, the reader will observe, with the customs and usages of a particular locality, or with the usages of particular classes, such as merchants, during the period when they were enforced in special courts. Such customs and usages, it must be remembered, were rules of conduct for the inhabitants of a limited region, or for persons engaged in definite lines of business. They were not binding on all classes throughout the kingdom; they were not *common law*.

In this largest sense the term serves also to contrast the English system of law with other systems, especially with that of Rome. For example, we speak of the laws of Louisiana as founded on the civil or Roman law, while that of every other State of our Union has its origin in the common law of England.

31. **Common law is unwritten.**—The term is used in another sense, to designate that part of English jurisprudence which has not been embodied in statutes. It then means the unwritten law, or the law found in the decisions of the courts. The reader may ask, why should that part of the law which is found in judicial decisions be called “unwritten,” when those decisions have been written out and printed? It must be confessed that the word “unwritten” is not a very happy one to use in this connection, but it has

been used so long that it can not now be discarded. When we speak of the law of judicial decisions as unwritten, we mean that its rules have not been "prescribed in a specific form of words by the legislative authority," while the rules in statutes have been.

Many rules of the common law, using the term in this sense, have ceased to exist as such, having been formulated in acts of Parliament in England, or in acts of Congress for the United States as a nation, or in acts of a State Legislature for a particular commonwealth. In this way they have been transformed from unwritten to written law, or, in other words, from common to statutory law. In some of our States, as in California, substantially all legal rules and principles have been codified—that is, have been stated in statutory form. The common law, therefore, in the second sense of the term, does not exist in that State, while in the first sense it still continues. Its form is written or statutory; but its substance is that of the common-law, not of the civil-law system.

**32. The second signification modified in many States.—**In other States of our Union, the term, in its second sense, has undergone a different modification. When the colonies separated from England and became independent States they were free, of course, to continue the English system of law, or to reject it, or to modify it. Some of them formally declared that so much of the common law and of the statute law of England, as well as of the statute law of the particular colony, as did then form the legal system of the colony, or was suited to the needs of its people, should thereafter constitute the law of that State.

In this way the term common law has been subjected to a peculiar modification in those States. It has come to mean those legal rules and principles which were binding on the people of a particular State, at the opening of the American Revolution, as distinguished from those which

have been added by the legislation of the State, since its separation from Great Britain.

**33. Common law as the law of certain courts.**—A third signification of the term serves to contrast the law, as it was administered by one class of judicial tribunals, with the law as it was administered by other classes. The body of legal principle and usage recognized and enforced by the courts of the King's Bench, of the Common Pleas, and of the Exchequer was the common law in this third sense of the term. Those courts were the common-law tribunals, in contrast with the equity and the Admiralty courts; and their system of pleading and procedure was styled common-law pleading and procedure.

It is the common law, in this sense of the term, against which the charge of technicality, of narrowness, of arbitrary and rigid rulings is most frequently and most persuasively brought. It was this body of legal doctrine and this form of legal procedure, which the merchants most stoutly objected to, and sought exemption from in their special merchants' courts. It was to give redress to suitors, who were without remedy in these common-law courts, that the Court of Chancery<sup>1</sup> was instituted; and it was to supplement the common law, to relieve from its technicalities, and to cure its defects that the system of equity was worked out by the chancellor and his judicial associates.

**34. Merger of common-law and equity courts.**—Although the term is still used in this third signification, the

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<sup>1</sup> This court derived its name from the Lord Chancellor, who was its chief officer. Its establishment came about in this way: Prior to the reign of Edward III, a person who thought himself wronged by the ordinary courts of law, or to whom these courts could not give redress, appealed directly to the king for relief. As these applications increased, the king began to turn them over to the chancellor for decision. In the twenty-second year of the reign of Edward III, a general order was made referring all petitions of this sort to the chancellor, and thus setting up a court of chancery.

common law is no longer separated from equity by a great gulf of principle and procedure, as it was three centuries ago. In England, the courts of common law and of equity have been consolidated into one Supreme Court of Judicature, with a single system of procedure; and a similar change had been made many years earlier in most of our States.

Even before this consolidation of courts, with its attendant merger of the two systems of rules, the common law had absorbed many equitable principles and freed itself from not a few of its old technicalities.

**35. Origin of the common law.**—Using the term in the first and second significations above described, the common law had its origin in the usages of the English people at large, as the law merchant had its rise in the usages of a class. The development of the two bodies of legal rules, however, followed widely different lines. We have called attention already to the fact that the merchants' courts despatched their business rapidly. The pleadings—that is, the statements of the plaintiff's claim and of the defendant's reply thereto—were informal; the proceedings in court were pushed to a speedy conclusion; the judges did not indulge in the preparation and presentation of carefully considered and elaborate opinions, and the cases were not reported. As a result, the decisions did not become fixed precedents binding upon the judges in future cases. On the contrary, the law merchant was free to conform to the changing needs of business, and its rules were handed down by tradition rather than in court records or in legislative enactments.

**36. Common-law courts were deliberate and spectacular.**—In striking contrast to the courts *pepoudrous*, where as speedy justice was to be done as dust could fall from the feet of impatient suitors, were the Superior Courts of England, in which the common law was developed. They were

not in haste. They did not sit from day to day and from hour to hour, in their anxiety to dispose of litigation promptly that the litigants might go about their other business. They sat only at stated periods, and then only from eight to eleven in the morning. "For in the afternoons," writes Sir John Fortescue, in the fifteenth century, "these courts are not holden. But the suitors then resort to the perusing of their writings, and elsewhere consulting with the serjeants-at-law and other their counselors."

If the plaintiff's lawyer had made a mistake in the form of action which he had brought, or in his manner of stating the cause of action, or in the formal conduct of the litigation, the plaintiff, after waiting months for a hearing, might be turned out of court upon a mere technicality, before the merits of his case received any consideration. Even when no technical mistake had been made by his lawyer, he was obliged to await the slow and stately processes of the court. A recent writer, commenting upon this phase of common-law procedure, declares: "In the eyes of most laymen, the conduct of civil disputes is by no means carried on in a business-like way. There is in the processes of a lawsuit too much the air of a tournament in the setting of the scene; the knight combatants enter the lists on behalf of their clients with more zeal for the display of forensic skill in battle than is compatible with a prompt conclusion; their more exalted colleagues on the bench seem mainly bent on letting each side have full as well as fair play; while the spectators, legal and lay, crowd the court in order to enjoy the spectacle."

And yet this very deliberation of a common-law court, this stateliness and ceremonial, this spectacular element in its procedure, have contributed not a little to its success. They have fostered a full and fair discussion by trained lawyers of the principles involved in each litigated case. They have established the practise of oral examination and

cross-examination of witnesses. They have subjected the judges to the criticism of the press and of the public, and have made them careful in their consideration and decision of cases.

**37. Recorded precedents.**—Moreover, at an early day, the practise of officially reporting the decisions of these courts was established. These reports, containing as they do brief statements of the questions in dispute between the parties to each case, with outlines of the legal arguments on behalf of each side, and with the reasons assigned by the judges for their decision, have exercised a great influence over the development of the common law. When a matter of dispute is brought before a court for determination, the first inquiry is, has a like case been presented and decided previously? If this has happened the task of the court is an easy one ordinarily. *Stare decisis et non quieta movere*—"To stand by decisions and not to disturb what has been settled"—is its motto. Accordingly this case is disposed of as the like case was disposed of before it. A precedent has been established and must be followed by the judges. A rule of law has been fixed, to which parties to like transactions must conform, and upon which lawyers can safely rely in advising their clients hereafter.

It is true that this strict adherence to precedent does not always result in doing abstract justice in a particular case; but it is the theory of the common law that it is better for the community at large that legal rules be definite, and known and enforced, than that they remain uncertain while halting human wisdom strives to bring them to perfection.

**38. Unfortunate precedents.**—At times, it must be confessed, this common-law consecration of recorded decisions—of judicial precedents—has resulted in grievous hardship to individual suitors. It may be that the original decision, when made, was in accord with business usages, or business



needs, or the ideal of justice then prevailing in the community. But, in the meantime, one or all of these have undergone a change, while the rule established by the precedent has not altered. It is definite, intelligible, rigid. Even though it produces injustice rather than justice, it must be enforced by the courts until it is abolished or modified.

The attitude of common-law courts when called upon to enforce such a precedent is that taken recently by a learned judge of the Illinois Supreme Court. The question for decision was whether a passenger who, having received a wrong transfer slip from a street-car conductor, and, having refused to pay another fare, was put off the car, could recover damages from the street-car company for the forcible expulsion. Said the learned judge: "I concur in the conclusion that the plaintiff can not recover these damages. He is entitled only to the repayment of his fare. I concur because the precedents established by this court prevent a recovery by him. The law is a science of precedents. I bow to the law as announced by the authorities, but am not obliged to surrender my right of private judgment; and in my opinion, the doctrine referred to is unsound and an abhorrent subordination of the rights and convenience of passengers to the interests of railroad companies." Similar language was used by Chief-Justice Cockburn of a rule of equity which he felt bound to follow. He said: "But though this seems consistent neither with justice nor common sense, it has been so long firmly established that it can only be altered by the legislature."

**39. Getting rid of inequitable precedents.**—How can the abolition or modification of a legal rule based on unfortunate precedents be accomplished? In one of three ways, the first of which is by intervention of equity. The right of the English chancellor thus to intervene for the relief of suitors who were victims of the harsh rules and the technical procedure of the common law was not established without

a long and hard struggle, in the final stages of which Lord Coke was the champion of the common law and Lord Bacon was the champion of equity. Lord Bacon's view prevailed, and thereafter it was the accepted doctrine that "it is the office of equity to mitigate the rigor of the common law, to supply its deficiencies, to relieve from its technical rules, and to decide controversies according to equity and good conscience."

**40. Legislative correction of precedents.**—The second method of obtaining relief is by legislative enactment. This was the method pursued by the bankers and merchants of Lombard Street, as we have seen, when Chief-Justice Holt's decisions were likely to form precedents, opposed to mercantile usages and harmful to the interests of trade.

**41. Distinguishing and limiting precedents.**—Still a third method is that resorted to by the common-law courts themselves. When the judges become convinced that an established precedent is working injustice, they may overrule the mischievous decision, or they may distinguish the case which is before them from the one in which the mischievous decision was rendered. As a rule, they pursue the latter course. This saves them from openly violating their motto of *stare decisis*—"standing by the decisions"—and enables them to feel their way cautiously toward the formulation of a new and better rule on the subject.

**42. Principles deducible from recorded cases.**—But suppose the matter in dispute has not been previously decided—that there is no judicial precedent which exactly covers the case now before the court. Even here the reported cases are not without value. They will be carefully examined by the lawyers for the contending parties, as well as by the judges, for statements of general principles or of maxims, from which the true rule applicable to the pending case may be deduced. It is in such a case that the great advocate or the great judge finds inspiration to lofty efforts, and

a field for the display of all his powers. It is then possible for a Mansfield to make the impression described by Mr. Justice Buller in his famous eulogy of that remarkable chief justice: "We all know the great study has been to find some certain general principle, not only to rule the particular case under consideration, but to serve as a guide to the future. Most of us have heard those principles stated, reasoned upon, enlarged, and explained till we have been lost in admiration at the strength and stretch of the human understanding."

**43. Flexibility of the common law.**—The common law is imperfect necessarily, for it is a product of the human mind and will. It is open to criticism. If the student is curious to know what criticism, fair and unfair, may be visited upon it, he should read Jeremy Bentham's works. On the other hand the common law has always had its ardent, if not blind admirers. During the struggle between the courts of common law and the chancellors, to which reference has been made, Lord Coke and his followers did not hesitate to declare that the "chancellors interfered through ignorance of the goodness of the common law," and that "the law of the realm is a sufficient rule to order you and your conscience what ye shall do in everything and what ye shall not do."

If the common law consisted solely of a code of hard and fast rules laid down in the decisions of reported cases, and of the technical procedures which formerly prevailed in its courts, it would deserve harsh criticism. But it does not consist of those alone. Indeed, they are rather the external trappings of the system, while its spirit is found in broad legal principles which the courts apply to the facts of each particular case. As a body of principles it is constantly undergoing change in order to adapt itself to the new needs of the people. It is flexible and expanding, not rigid and stationary. Viewed as a body of principles and

a system of reasoning, rather than as a code of rules and system of procedure, the common law is not unworthy of the encomium of Sir Matthew Hale: "It is not the product of the wisdom of some one man or society of men in any one age, but of the wisdom, counsel, experience, and observation of many ages of wise and observing men." With all its faults it has served and continues to serve well the English-speaking peoples of the world, for "it is the product and measure of their character and temper; the reflex of their life and character."

## CHAPTER III

### CONTRACTS

#### § 1. HOW A CONTRACT IS MADE

**44. A knowledge of the principles governing contracts is important.**—Before taking up the various branches of business law, it is important that the student should gain a clear idea of the general principles of contracts; for without a knowledge of these he will be unable to follow intelligently the discussion of agency, of bailments, or of the other topics.

**45. Definition and essentials of contract.**—As a legal term, contract means an agreement enforceable by law. While there may be an agreement without a contract, there can not be a contract without an agreement. The very first essential of a contract is the meeting of minds of two or more persons—their mutual assent to a definite proposition—an agreement between them. But, though the parties may have agreed, the law may decline to enforce that agreement. If it does there is no obligation upon the parties—no bond holding them together. Either party may break his agreement without subjecting himself to any legal liability.

Our law declines to enforce an agreement unless: (1) It is made by parties who have legal capacity to contract; (2) Unless a legal consideration has been given for the promise contained in the agreement; (3) Unless there is a lawful subject-matter for the agreement. These essentials

of a contract we shall discuss with appropriate fulness presently; but before doing so let us briefly consider some transactions that are often spoken of as contracts, but which are not contracts at all.

**46. Obligations which are not true contracts.**—It must be confessed that even eminent judges and law-writers have been very careless in their use of the term contract. For example, they often speak of a judgment for money as a contract—"a contract of record." Surely here is no promise to pay on the part of the judgment debtor—that is, the person who was the losing party in the lawsuit and against whom the court ordered the judgment to be entered. He may feel and often does feel that the debt is one he ought not to pay. So far from ever actually promising to pay the judgment, he has done everything in his power to repudiate any liability for it, and to escape payment. He pays the debt because the State, through its courts and their officials, compels him to pay it, not because he has agreed with the other party to pay it.

Again, A takes and uses up certain property, such as grass, grain, clothing, or money, believing it to be his, when in fact it is B's. In such a case, B has his choice of two forms of action against A: He may bring an action in tort, for the conversion of the property—that is, he may treat A's taking and use of the property as a legal wrong, and recover damages against A for the wrong; or, he may waive the tort,<sup>1</sup> as it is said, and may sue A for the value of the property, precisely as though he had sold it to A. *The liability of A in this second form of action is often spoken of as a contract liability.* Here, as in the case of the judgment, there is no actual promise to pay on the part of the person who is forced by the court to pay.

**47. Quasi contracts.**—In both of these cases, and in many similar ones which might be referred to, there is not a true contract between the parties. There is no meeting of

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<sup>1</sup> See Appendix, p. 272.

minds—no agreement. The liability of the one party to the other does not rest on an actual promise; it rests on a rule of law. *These cases are examples of quasi contracts—of obligations resembling contracts—not of true contracts;* of liabilities arising from a rule of law, not from the voluntary agreement of the parties. They are spoken of as resembling contracts only because the law permits them to be enforced by contract actions.

**48. Contract may be made by acts.**—While an actual promise is essential to a true contract, *it is not necessary that the promise be made in express words.* A hails a street-car and enters it as a passenger. He has made a contract with the street-car company, binding him to pay the regular fare to the company, and binding it to transport him as a passenger, even though not a word about the fare or the ride may have passed between him and the company's agent, the conductor. By the very act of running its cars the company makes an offer to carry passengers for a remuneration. This offer the passenger accepts when he enters the car. Each makes a promise to the other which the law will enforce.

It is true the promises are not expressed in words, as when A says to B, "I will work for you, as bookkeeper, for a year, at fifty dollars a month," and B says, "I accept your offer, and will pay your price"; but the promises are as actual in the one case as in the other. The street-car company and the passenger intend to enter into a contract, and understand that their acts are equivalent to words.

**49. Offer and acceptance.**—If any case of true contract is analyzed, it will be found that the process leading up to its formation always involves *an offer by one party to do something*, which he has a legal right to refrain from doing, *or to forbear doing something* which he has a legal right to do; and *an acceptance of that offer by the other party.* With-

out such offer and acceptance, made either by words or by acts, there can not be a true contract.

**50. Intention to contract.**—It is to be borne in mind, however, that not every offer and acceptance constitutes a contract. B accepts A's invitation to dinner. Here is an offer by A to supply B with a meal if B will take the trouble to come to A's house, and the offer is accepted by B; but there is no contract. A's promise to furnish the dinner is not one "enforceable by law." *It is a social engagement only, and not intended by the parties to impose legal liabilities on either of them.*

Again, X hands his watch to Y, who gives his check to X for three hundred dollars. Upon these facts it would appear that X had offered to sell his watch to Y for three hundred dollars; that Y had accepted the offer and had given his check for the purchase price. But suppose Y, when sued on the check by X, shows that the whole matter was a piece of frolic; that the watch was worth only fifteen dollars; that he had no money in the bank on which the check was drawn; that after he was sued he tendered the watch to X, and that both he and X, as well as the others who were present, understood that *the whole affair was one of frolic and banter, and not one of business*, surely a court should hold, as it has held, that there was no contract between X and Y.

It is true such fooling is hazardous for Y; for when we come to discuss negotiable paper, we shall discover that had X sold and indorsed the check directly after receiving it to one who knew nothing of the transaction in which it was given, such purchaser could have compelled Y to pay the full amount.

**51. Preliminary negotiations.**—Such cases, as we have been considering, of social engagements and of frolic, do not often come before the courts, and when they do are not difficult to decide. But another class of cases, in which



there is an appearance of an offer and acceptance, intended by the parties to constitute a contract, is more troublesome. A standard example of this class is an old English case, decided three centuries or more ago. "The defendant told the plaintiff that he would give one hundred pounds to him who married his daughter with his consent. Plaintiff married defendant's daughter with his consent, and afterward claimed the fulfilment of the promise, and brought an action upon it. It was held *not to be reasonable that a man should be bound by general words spoken to excite suitors.*"

Similar decisions have been made in cases where business circulars have been sent out to excite customers. If the court is satisfied, from the circumstances of the case, that what bears the appearance of an offer is put forward simply as a statement of intention to do something—for example, to sell goods at auction—or as a preliminary to business negotiations, it will hold that the mere acceptance of it by the other party does not turn the transaction into a contract. A bookseller's catalogue with the prices stated for the various books or a business circular calling attention to specified goods which are for sale at specified prices is to be treated as a preliminary announcement or advertisement of intention, not as a formal offer to each person to whom it is sent.

**52. Offer must be definite.**—Not only must the offer be made with a view to the immediate formation of a contract, but it must be made to a definite person. A man's obligations to the indefinite public are political, not contractual. He does not enter into a contract with his neighbors or fellow-citizens to keep the peace, to live honestly, and to perform his duties in society. In order to come under a contract obligation, *he must make an offer which he intends for acceptance by a definite person.*

This does not prevent a contract arising in a case where one offers a reward to the finder of property, to the captor of

a criminal, or to one doing some other definite act. It is true that the offer is not made to an ascertained person; that it is made to any one who finds the property or captures the criminal, or does the specified act; *but the acceptance of the offer*, which consists in finding the property, or capturing the criminal, or doing the designated act, *fixes at once the individuality of the other party*. Hence, the moment the contract comes into existence its obligation is between definite persons. An example is afforded by a case in Wisconsin. B publicly announced that he would give five thousand dollars to any one who would bring the body of his wife, alive or dead, out of a burning building. Upon hearing the announcement, C entered the burning building and brought out the dead body of B's wife. B was bound by contract to pay the reward to C.

Such a case is, in principle, much like that of one who makes a promissory note payable to bearer. He promises to pay it, not to the world at large, but to the individual who is in lawful possession of it, when it falls due, although he does not name that individual in the note; and, of course, when it is made, can not be certain of the personality of the one who may chance to be the holder when it falls due.

**53. Definiteness of promise.**—The subject-matter of the contract, as well as the parties, must be definite. Vagueness and uncertainty of statement usually indicate that the parties do not intend to bind themselves by contract; that each is willing to trust to the other's sense of fairness, and is not striving to bring him under the pressure of a legal obligation. A bought a horse from B for fifty pounds cash, and promised to pay five pounds more or the buying of another horse, if the horse was lucky to him. *Such a promise was declared to be too loose and vague to constitute a contract*. Again, W promised to sell certain goods to X for such price as they might agree upon thereafter. Here a part of the subject-matter—the goods—was definite, but the

other part—the price—was indefinite, and might remain indefinite always, for W and X might never agree upon it. Consequently there was no contract of sale.

Even when a party clearly intends to enter into a contract, *his carelessness in describing the subject-matter may prevent the formation of a contract.* M sent a postal card to N, with these words: "Please send me *pice* of counter screens like draft," and following these words was a draft of the screen with measurements. The court held that the card was unintelligible; that "*pice*" might have been intended for "price" or for "piece," and that N had no right to treat the card as an order for a "*piece*" of counter screens.

**54. Acceptance must be absolute and unqualified.—**When A writes to B that he will sell his farm to B for five thousand dollars cash, and B sends the written answer, "I accept the offer contained in your letter" of such a date, a valid contract is made. But if B replies, "I will buy your farm for five thousand dollars, *provided you will take in payment notes of C which I hold,*" no contract is formed. A's offer calls for cash, and B does not accept this absolutely; he accepts the offer upon condition that it be changed in a material respect. As a matter of law, B does not accept at all. His answer is a new offer. A may accept this counter-offer or not. If he does accept it, absolutely and unequivocally, a contract is consummated. If, on the other hand, he rejects it, not only is a contract not concluded, but, thereafter, B has no right to conclude a contract by accepting A's original offer. B's counter-offer was, in legal effect, a rejection of A's offer. He has sinned away his day of grace, and lost a bargain. In contracts as in ethics, one should agree with his adversary quickly; agree with him absolutely and unconditionally. *The terms of the acceptance must be identical in meaning with those of the offer.*

**55. Right to withdraw offer.**—We have said that the offeree should accept the offer quickly, if he wishes to be sure of concluding a contract upon its terms. The importance of prompt action is due to the fact that *the offerer may, at any moment, withdraw his offer*. He may do this, although in the offer he has stated that it should remain open for a specified time. Such a statement is not legally binding on him, for reasons which will appear when we take up the topic of Consideration. On the other hand, it serves as a notice to the offeree that the offer will not be held open beyond the specified time, and that an acceptance after that period can not be made.

**56. How offer may be withdrawn.**—Ordinarily the withdrawal of an offer is made in express terms, and, as a matter of safety, it should be so made, whenever that is practicable. If the withdrawal is communicated to the offeree before acceptance, his right to accept is terminated.

At times, however, the offer is withdrawn by the acts or conduct of the offerer, instead of by words. Cases of this sort—that is, of implied withdrawal or revocation of the offer—have given the courts not a little trouble, and the judicial decisions, as well as the views of legal writers, are not entirely in accord regarding them. An example of this class of cases is the following: O offers to sell certain goods to C for a stated price, at any time within two days. A few hours later he sells and delivers them to D for a larger price. As he has transferred the goods to D by a valid contract, he can not sell them thereafter to C; but *to prevent C from accepting his offer, and thus bringing him under a contract obligation to sell, he should notify C at once that the offer is withdrawn*. Undoubtedly, if C were present when the sale to D was made, his personal knowledge of the transaction would absolve O from giving him any formal notice. Such notification would be idle. C could put but one construction on O's conduct—

namely, that it was an implied or tacit revocation of the offer.

**57. The lapsing of an offer.**—Another example of implied revocation or withdrawal of an offer is afforded *when a reasonable time has elapsed since the offer was made*. It would be unfair as well as contrary to the understanding and usages of business men to hold that when a person makes an offer to sell an article at a specified price, or to perform services for a given compensation, it is made for all time. If a party offers to sell wheat at a dollar a bushel, or to carry freight at a specified rate, or to buy stocks at a fixed price, he does not intend to hold himself in readiness forever to supply the wheat, or to carry the freight, or to transfer the stocks, at the rate named, or at all; and the offeree, as a reasonable business man, understands that the offerer had no such intention. The law seeks to give effect to the real intentions and understandings of the parties. Accordingly, in each case the court inquires, what do the business usages applicable to the particular transaction warrant us in declaring is a reasonable time? In some cases forty-eight hours have been held more than a reasonable time; and, undoubtedly, where an offer is made of stocks or other articles of a fluctuating value, or of very perishable articles, such as certain kinds of fruit, an offer might be impliedly revoked by the lapse of six hours, and an acceptance thereafter would be too late.

**58. Death of the offerer.**—An offer can not be turned into a contract by its acceptance after the offerer's death. In the language of a learned judge: "The continuance of an offer is in the nature of its constant repetition. Obviously this can no more be done by a dead man than a contract can be made by a dead man in the first instance." It is often said that the death of the offerer operates as an implied withdrawal or revocation of the offer. This language is hardly appropriate. Revocation or withdrawal

signifies an act of the offerer, indicating his change of purpose. It is a voluntary refusal to contract; while *the death of the offerer interrupts the formation of a contract by the removal of one of the parties*. That the offerer's death ought not to be spoken of as a revocation is apparent from the fact that it renders a subsequent acceptance worthless, even though the offeree did not know of the death when he sent his acceptance.

**59. Communication of offer.**—Something should be added about the communication of the offer as well as of the acceptance and of the revocation when the parties are in different places during their negotiations.

With respect to the offer there is little if any difficulty. Until this is brought to the knowledge of the offeree it is entirely ineffective. A, in Chicago, may send by mail or by telegraph to B, in New York, an offer to sell a thousand bushels of wheat at a dollar a bushel. Before this comes to B's knowledge he may order from A a thousand bushels of wheat at a dollar a bushel. These two offers do not make a contract. In order to turn A's offer into a contract B must accept it, and in order to turn B's offer into a contract A must accept that. *Until acceptance by one or the other, there is no meeting of minds*. Their opinions and interests may coincide, but there is no consensus of wills; there is no mutual consent to a contract obligation.

**60. Communication of withdrawal.**—Moreover, if before the offeree accepts, a revocation from the offerer is brought to his knowledge, his right to accept is lost. *It is not lost or in any way affected by an attempted revocation which is not brought to his knowledge*.

A sends an offer by mail. Before the letter reaches B, or before his acceptance of the offer, he receives a telegram from A withdrawing the offer. He can not bring A into a contract by thereafter accepting the offer. On the other hand, if the telegram does not come to B's knowledge until

after he has accepted the offer, it is ineffective and A is bound by contract. *True, there is no actual meeting of minds* in such a case, but as the continuance of an offer is deemed by the law a constant repetition of it, *there is a conventional meeting of minds*. Without such a doctrine it would be extremely hazardous to accept offers made by mail or telegraph.

It is declared by some writers that an acceptance may be revoked before it comes to the knowledge of the offerer. In the next paragraph, however, we shall see that an acceptance may conclude the contract even before it is communicated to the offerer; nay, though it never reaches him. *In such cases, surely, the revocation of an acceptance ought not to be allowed*, and there is very little judicial authority in favor of allowing it.

**61. Communication of acceptance.**—Upon this point there is some difference of opinion, although the prevailing view, both in England and in this country, is that *a person who makes an offer by letter or by telegram becomes bound by contract the moment the offeree despatches his acceptance by mail or by telegraph*. The letter or telegram of acceptance may miscarry, still the offerer is bound, unless, indeed, the miscarriage is due to some fault on the part of the offeree, such as a misdirection. This view is based on the ground that the offerer impliedly authorizes the offeree to send his acceptance by mail or by telegraph. A delivery of the acceptance, therefore, to the post-office or telegraph agents has the same legal effect as a delivery to an agent of the offerer.

This view has been criticized severely in England, as well as in this country, and was rejected in an early Massachusetts decision. Under that decision an acceptance, to be effective, must be actually communicated—must be brought to the knowledge of the offerer. Until that happens there is no contract. Recently, however, the Supreme Court of

that State has overruled the decision referred to, and adopted the prevailing view.

Sir Frederick Pollock, after expressing regret that the earlier Massachusetts view had not been taken by the English courts, makes this remark, which should be borne in mind by the reader: "The practical conclusion seems to be that every prudent man who makes an offer of any importance by letter should expressly make it conditional on his actual receipt of an acceptance within some definite time." Such is the frequent, perhaps ordinary, practise of business men in this country.

**62. Necessity of consideration.**—It is a general rule of English law that a promise is not legally enforceable unless it is supported by a consideration. Before attempting to explain this rule, it may be well to dispose of its exception. These are found in so-called contracts of record—that is, court judgments—and contracts under seal. Of the former class we need say nothing in this connection, for we have shown already that they are not true contracts at all.

**63. Contracts under seal.**—Of the second class, the typical representative is a bond, of which the following is a specimen:

KNOW ALL MEN BY THESE PRESENTS. That I, John James, of New York city, am held and firmly bound unto Joseph Johnson, of the same place, in the sum of one thousand dollars, to be paid December 1, 1902, to said Johnson, his attorney, executors, administrators, or assigns; to which payment I bind myself, my heirs, executors, and administrators firmly by these presents.

*In Testimony Whereof*, I have set my hand and seal, this First day of December, One thousand nine hundred and one.

JOHN JAMES. [Seal.]

The foregoing is called an absolute bond, because it binds the maker to pay the sum named absolutely. Often a bond contains a conditional clause, inserted between the



words "firmly by these presents" and "In Testimony Whereof" in the above form, which provides that if the obligor—that is, the maker of the bond—does a certain act, for example, pays a stipulated sum of money, or conveys described property, or honestly performs the duties of some position, as of bank teller or cashier, or of private or public treasurer, then the "bond shall be void; otherwise it shall remain in full force and effect."

64. **A deed.**—A bond is not the only form of contract under seal. The parties to any written agreement may convert it into a sealed contract by intentionally attaching a seal and delivering it as a "deed." This word "deed," although popularly used to designate a conveyance of land, is the technical term in law for any sealed instrument. Perhaps the narrowing of this term in popular usage is due to the fact that the only important case in which the common law required a seal to be attached to a written agreement of a natural person was that of a conveyance of real estate. Such a conveyance would naturally be deemed a deed *par excellence*. At present, however, a seal is required to be attached to various contracts of natural persons, as well as to those of corporations, in order to render them valid and effective; but the statutes on this subject are so different in different States that no attempt will be made to give their provisions here.

The execution of a deed, or contract under seal, consisted at common law in sealing and delivering it. Both of these acts were necessary to its validity, but the signature of the maker was not. Indeed, during the middle ages, when the legal rules respecting deeds became fixed, writing was a rare accomplishment, and men generally attested their contracts and conveyances by affixing their seals, rather than by writing their names. At present the execution of a deed consists in signing as well as sealing and delivering it.

**65. What constitutes a seal.**—The common-law seal was an impression made on wax, wafer, or other substance attached to the paper or parchment on which the agreement was written. This impression was made with a signet-ring or die, often having some heraldic device peculiar to its owner. In most of our States no such formal impression is necessary. A piece of wafer, or of adhesive paper, or an impression made directly upon the paper or parchment by a die, and in some States even a scroll or a flourish of a pen, may serve as a seal. Here again the statutes of each State must be consulted if the reader would know what changes have been made in the common-law definition of a seal.

It is not necessary that the maker of a deed personally attach the seal. It is enough if he declares by word or action that he adopts the seal as his own. Writing his name opposite the seal, and delivering the instrument as his deed will amount to an adoption of the seal.

**66. Delivery of a deed.**—The formal delivery of a contract under seal consists ordinarily in handing it over to the party to be benefited by it; but if the party making it declares in good faith that he delivers it as his act and deed, such declaration is equivalent to delivery, and he will be bound by it, although he retains it in his custody. The transaction has the same legal effect as though he had handed the deed to the obligee (the party to be benefited), and the latter had then passed it back, with the request that it be kept for him.

**67. Deed differs from simple contract.** (a) **In respect of consideration.**—We have described thus fully the contract under seal, because of the important respects in which it differs from the ordinary or simple contract.

In the first place, as we have stated already, it is binding without a consideration, while every simple contract must have a consideration. This is explained generally by the statement that the seal conclusively imports a considera-

tion. The true explanation, however, appears to be that the rules of English law relating to deeds, or contracts under seal, were settled before the doctrine of consideration for simple contracts was developed; and thus deeds escaped from the application of that doctrine. Contracts under seal bind the contractor, *because they are under seal*—because the early common law declared an agreement *made in this form*, to be binding on the maker. In other words, a deed is enforceable by the law because of its form, while a simple contract—a contract not under seal—is enforceable because of a consideration.

68. (b) **Delivery upon condition.**—The second difference relates to the effect of delivery. If the maker of a deed delivers it to the other party upon some condition, for example, that it shall not bind the maker until a certain event happens, the delivery is absolute and final; the deed is binding on the maker, and the condition is void. In order to make such a condition effective, the obligor should not deliver the deed directly to the obligee, but to a third party with directions that he deliver it to the obligee when the event happens. While so held by the third party, it is said to be an *escrow*, a mere scroll or writing, not a contract obligation. When the stipulated event happens and the deed is delivered by the third party to the obligee, it takes effect, as a rule, not from that date, but from the date of its delivery by the maker to the third person.

A written contract not under seal may be delivered by the party making it directly to the other party, upon any condition which the maker may see fit to impose; and until and unless such condition is fulfilled, the holder can take no benefit under it. For example, A offers his horse to B for three hundred dollars. B replies that he will look at the horse, and if it suits him he will buy it at that price. Thereupon he writes, signs, and hands to A the following paper: “On demand, I promise to pay A three hundred

dollars at my place of business," saying that if the horse does not suit him this paper shall be returned. The horse does not suit him, and he notifies A. The writing is worthless.

69. (c) **Estoppel by deed.**—Another point of difference is that a statement in a deed which a person admits having executed and delivered can not be disputed by him. To use a technical legal term, he is "estopped" from denying any matter which he has asserted in a deed. Not so with respect to a simple contract. The writing is strong evidence against the maker that every statement in it is true, but it is not conclusive. The maker may show that a statement contained in the writing is erroneous, unless such statement has been relied upon by the other party and has induced him to alter his position. In other words, the maker of a deed is estopped from denying any statement in it because *it is in the deed*. The maker of a written contract not under seal is estopped from denying a statement in it only when that statement has induced the other party to alter his position in reliance upon its truth.

70. (d) **Merger.**—Another point of difference is disclosed by the doctrine of "merger." If A is owing B one hundred dollars, and gives him a written promise to pay it on a certain day, but does not pay as agreed, B may sue A either on the original debt or on the written contract. If, however, A had given his bond for the payment of the money, his original indebtedness would have been extinguished, and the bond would be the only contract remaining between them. The original contract for the payment of this money would be "merged" in the sealed contract, because that is regarded by the law as of a higher grade than any simple contract.

71. (e) **Specialty creditors preferred.**—This higher nature of a deed or bond—also spoken of as a specialty—is shown again by the preference given to it by the common

law over simple contracts in the settlement of a deceased person's estate. A specialty creditor was to be paid in full before simple contract creditors could have anything.

72. *(f) Limitations of actions.*—The last important difference which we shall notice is in the limitation of actions. A party who fails to perform a simple contract at the agreed time must be sued within six years from that date, or the cause of action will be outlawed; while a party who breaks a contract under seal remains liable to an action for twenty years thereafter.

73. *(g) Statutory changes.*—Some of these qualities of the specialty or sealed contract have been changed by legislation in most of our States. Under many statutes a specialty creditor has no longer a preference over a simple contract creditor in the distribution of a deceased person's estate; nor does a seal make a contract absolutely binding. In the language of some of these statutes, the seal raises a presumption that a consideration has been given by the obligee, but this presumption is not conclusive. The maker, or obligor, is allowed to dispute and overcome this presumption by evidence that no consideration was given.

In States where such statutes are in force a person who is sued on a sealed contract will lose his case unless he can show that a consideration was not given; while one sued on a simple contract will win his case unless the other party shows that a consideration was given.

74. *The doctrine of consideration.*—We shall now explain the meaning of consideration in our law of contracts. It would be quite irrelevant here to trace the history of this doctrine, for that would involve the explanation of much that is obsolete, and more that is highly technical in English common law. Nor shall we attempt to show that our law is wiser or better than the Roman law in requiring a consideration for simple contracts. We shall content ourselves with an effort to make plain the doctrine itself.

**75. Definition of the term.**—A learned English judge has defined consideration as consisting “either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.” A shorter statement, often found in law books and in the opinions of judges, is that it consists in a benefit to the promisor or a detriment to the promisee. A still shorter and more accurate definition is “a detriment to the promisee.” This is the very essence of consideration. It must be present in every case, to make the promise enforceable by law, while “a right, interest, profit, or benefit accruing” to the promisor is not essential. An every-day transaction will illustrate this.

A wishes to buy property, or to borrow money from B. The latter will not trust him, but says, if you can get C to promise payment to me, you can have the property or the money. C does so promise, and B, on the strength of that promise, delivers the property or the money to A. Here is a valid contract between B and C, and yet C, the promisor, has derived no benefit from the transaction. B, however, has sustained a detriment. He has parted with money or other property. He has furnished a valuable consideration for C's promise.

**76. Surrender of a legal right.**—But parting with one's property is not the only way in which a valuable consideration may be furnished by the promisee. The surrender or forbearance of any legal right in exchange for the promise constitutes a valuable consideration. I say to you, Let me take your watch for an hour, and I will return it in as good condition as it now is. You hand me the watch. I have entered into a binding contract with you. I may not need the watch. My motive in asking for it may be as idle and whimsical as that of the child who wants “to see the wheels go round.” That is immaterial. The watch is yours. You had a legal right to keep it in your posses-

sion. When you handed it to me you surrendered that right at my request, and in exchange for my promise. My promise to return it in its then condition was based on a valuable consideration, and if the watch is injured while in my possession, or if I do not return it, I am liable to you in damages for my breach of contract.

**77. Forbearance of a legal right.**—This also constitutes a valuable consideration for a promise when made at the request of the promisor. The following is an example: A is pressing B to pay a debt due A. C asks him not to sue B, and promises that if A will forbear suing for a definite time or a reasonable time, he will pay the debt. A assents. This forbearance of his legal right to sue at once is a valuable consideration for C's promise, and a contract is made between C and A.

**78. At the request of the promisor.**—It is important to bear in mind that the surrender or forbearance of a legal right must be made at the request of the promisor. If A, seeing that B's haystack is in danger from fire, leaves his own work and spends time and energy in saving his neighbor's property, he can not recover therefor against B. Nay, even though B, upon learning of A's services, promises to pay him a stipulated sum, his promise is not enforceable by English common law, for the services were not rendered at his request. He may be under a moral obligation to A, but he is not subject to a legal obligation. True, A suffered a detriment and B received a benefit, but no legal consideration for the promise existed. This is called by some writers a case of unreal consideration.

Another case, falling within the same principle, is the following: X owes Y one hundred dollars. He pays fifty dollars to Y upon the latter's promise to take it in satisfaction of the entire debt. Here is no contract binding upon Y. He can maintain an action the next moment against X for the remaining fifty dollars. When X paid

one-half of the debt he sustained no legal detriment. He was doing no more than he was legally bound to do. But suppose, instead of paying money, X had delivered or promised to deliver a cow, worth fifty dollars, to Y, upon his promising to take her in satisfaction of the debt. Could Y thereafter recover the remaining fifty dollars from X? No, because X was not legally bound to deliver the cow; he was bound only to pay money, and doing anything over and above what by law he was bound to do is a valuable consideration for Y's promise to accept it in satisfaction of the original debt.

**79. Artificiality of this doctrine.**—Probably most readers will agree that the language which Lord Coke once addressed to his Majesty King James I is applicable to this doctrine. The king had been advised by Archbishop Bancroft that he had the right to judge any case which was brought before an English court. Accordingly he summoned the judges to know what they had to say against this view. Lord Coke informed him that he had no such right. Whereupon the king expressed surprise, saying that he had always understood that English law was founded upon reason, and that he and others had reason as well as the judges. To which Lord Coke replied: "True it is that God has endowed your Majesty with excellent science as well as great gifts of nature, but your Majesty will allow me to say, with all reverence, that you are not learned in the laws of this your realm of England, and I crave to remind your Majesty that causes which concern life, or inheritance, or goods, or fortunes of your subjects are not decided by natural reason, but by the artificial reason and judgment of the law, which law is an art which requires long study and experience, before that a man can attain to the cognizance of it."

**80. The Statute of Frauds.**—Another branch of our law of contract which is highly artificial and confusing is that



which has grown out of the statute of frauds. The motives of Parliament in passing this statute were excellent, and the need of legislation was undoubtedly great. At the time of its enactment (A. D. 1676) parties to a lawsuit were not allowed to be witnesses, because the interest which a plaintiff or a defendant had in winning the suit, it was thought, would lead him to swear falsely. What was the result? The result was the plaintiff often hired persons to swear falsely in his behalf, only to be met by perjured witnesses on behalf of the defendant. This condition of things certainly needed correction. In the light of subsequent experience, it seems clear that the proper corrective would have been a statute permitting the parties to be witnesses. Parliament thought otherwise. In its judgment the cure for the evil was a statute requiring a prescribed kind of evidence for nearly every important business transaction.

Accordingly this statute, which in its preamble recites that it was enacted "for prevention of many fraudulent practises which are commonly endeavored to be upheld by perjury and subornation of perjury," required transfers of land to be in writing and signed by the parties making them or their authorized agents; that wills should be in writing and executed in a prescribed manner; that certain contracts should be reduced to writing, while others should be proved either by a memorandum in writing, or by certain formal acts, such as the payment of a part of the price or an acceptance and receipt of a part of the goods by the purchaser.

**81. Evils resulting from the statute.**—Some portions of this act of Parliament have proved beneficial, especially those relating to wills; but the provisions relating to contracts have caused greater evils than they have cured. More than half a century ago Chancellor Kent expressed the opinion that the statute had been explained at a cost of not less than five million dollars, and it still continues

one of the most fruitful sources of vexatious and expensive as well as of dishonorable litigation. An English chief justice declared, in one of his decisions, that he did not know what the draftsman of the statute meant by certain words in it, and he did not believe the draftsman knew. Another eminent jurist of England, after a careful study of the cases to which this piece of legislation has given rise, did not hesitate to speak of the provisions relating to contracts as a nuisance, and to advise their repeal. In his judgment these provisions are a constant incentive to dishonorable practises, and their evil influence is checked only by the fact that they have fallen practically into disuse in the larger commercial towns.

Notwithstanding all this, most of these objectionable provisions have been reenacted by the great majority of our State legislatures, and some account of them must be given here. We shall not undertake, however, to deal with them in an exhaustive or a technical manner.

**82. Sections IV and XVII.**—These are the sections of the English statute which are of chief importance in business transactions. They read as follows:

“IV. That no action shall be brought (1) whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.”

“XVII. That no contract for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling or upwards, shall

be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.”<sup>1</sup>

**83. Contracts are not void which fail to comply with the statute.**—It will be observed that the statute does not declare that any of the enumerated contracts are void, if not made in accordance with the legislative requirements. Its language in the fourth section is “no action shall be brought”; in the seventeenth, “no contract . . . shall be allowed to be good,” unless those requirements have been complied with. In some of our States this phraseology has been changed, and it is declared that these contracts shall be void unless they conform to the statute. Notwithstanding this change in language, the prevailing view in this country is the same as in England—viz., “That the form required does not go to the existence of the contract. The contract exists though it may not be clothed with the prescribed form.” When a party is sued on such a contract, he can defeat his adversary by pleading and proving that the statutory requirements were not complied with. To state the rule in another way, the contract is valid, but it is not enforceable in a lawsuit, provided the other party avails himself of his statutory defense.

**84. These sections have promoted artificial and technical reasoning.**—We can not attempt, in an elementary treatise, to explain the various clauses of the fourth section,

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<sup>1</sup> Neither the language nor the substance of this section appears in the statutes of Alabama, Arizona, Delaware, Illinois, Kansas, Kentucky, Louisiana, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, or West Virginia. In the other States this section has been reenacted, with varying modifications.

for that would lead us into some of the most perplexing divisions of the law of contract. For example, the second clause, relating to "any special promise to answer for the debt, default, or miscarriage of another person," has given rise to an astonishing amount of litigation, in which the reasoning of judges has been highly artificial and technical, if not obscure and confusing.

Comments on the seventeenth section will be reserved for the chapter on Sales of Personal Property.

**85. The statute as a nuisance.**—When the eminent English judge, James Fitzjames Stephen, declared those provisions of the statute of frauds relating to contracts a nuisance he gave expression, undoubtedly, to the view held by most business men. In large commercial centers those provisions are habitually ignored, and a man who attempts to escape from a contract, on the ground that it has not been put into the statutory form, is deemed guilty of dishonorable conduct. The haste and rush of modern business enterprise make it practically impossible for contracting parties to execute even the informal memorandum required by the statute, and as a result the statute is now invoked more frequently to perpetrate than to prevent frauds. It is the man who has entered into a losing contract who usually takes advantage of the statute. He pleads it, not to save himself from a contract which he never made, but to beat the other party out of what is honestly due him.

And yet such is the conservatism of the English and American bench and bar that attempts to repeal the statute have generally failed. Like the irresolute Hamlet, our legal profession prefers to

Bear those ills we have  
Than fly to others that we know not of.

## § 2. CAPACITY OF PARTIES

**86. Persons engaged in business are generally capable of contracting.**—In our discussion, thus far we have assumed that the parties to a contract were legally capable of binding themselves by it; and, as a rule, persons engaged in business transactions do possess such legal capacity. There are exceptions, however, which we now proceed to consider.

**87. The capacity of aliens to contract.**—In primitive law these exceptions are very numerous, but as a people becomes civilized and its legal system develops, they diminish both in number and importance. For example, primitive communities confine the power of making legal contracts to citizens. Aliens, whether from friendly or hostile states, are not allowed to exercise this power. Indeed, they are treated as not possessing any rights which citizens are bound to respect.

Modern law, however, accords to alien friends nearly every property and contract right which is possessed by citizens, and its tendency is to treat alien enemies, who are allowed to remain in the country during war, as possessed of similar rights. Only those aliens who are citizens of the country at war with the one where the contract is made, *and not resident in the latter*, are incapacitated from contracting with persons in the latter during the war. Even contracts by such aliens, made before the war, are not annulled; they are only suspended during the war, and are enforceable after its termination.

During our late war with Spain our Government did not force all Spaniards to leave this country. On the other hand, it permitted them to remain, to carry on business, and make contracts, so long as their transactions did not in any way aid the hostile operations of their own countrymen. Such contracts were enforced by our courts against

our own citizens, precisely as though Spain and the United States had been at peace.

**88. Common-law incapacity of married women.**—Another class of persons incapable, at common law, of entering into contracts, are married women. By a legal fiction, husband and wife were accounted but one person, *and the husband was that person*. Upon marriage he became possessed of all her real property, and the absolute owner of all the personal property in her possession. He also had the right to collect and use all debts owing to her. On the other hand, he was bound to support her in a style befitting his station and fortune, and to pay all debts, owing by her at her marriage.

From this common-law conception of the legal relation of husband and wife the doctrine of her incapacity to enter into contracts was easily deduced. At the present time, however, neither that conception nor that doctrine prevails. Modern statutes both in England and America have wrought a great change. Indeed, in some of our States married women are empowered to take, hold, and transfer property, to carry on business, and to make contracts of every description, precisely as their unmarried sisters may do.

**89. Incapacity of convicted criminals to contract.**—On the other hand, modern statutes have extended rather than diminished the contractual incapacity of one class of persons. At common law, convicted felons and outlaws could not enforce contracts, but were liable upon them. That is, they were not incapable of contracting; they were incapable only of benefiting by contracts. At present, in England and in many of our States, convicted criminals, sentenced to imprisonment in a State prison or similar institution, are incapable of exercising any civil rights, while those sentenced to imprisonment for life are deemed civilly dead.

90. **Incapacity of infants.**—English law is not peculiar in declaring that all persons under a prescribed age are incapable of contracting. Such rule is found in every legal system. True it is that this legal incapacity does not always accord with actual incapacity. Many persons at the age of seventeen are far more capable for and may be more successful in business than the ordinary individual at the age of twenty-five. Still, the age at which a person shall be allowed to exercise full legal control of his person and property must be fixed at some point by positive law, and that point is fixed in England and generally in this country at twenty-one years,<sup>1</sup> although in some of our States women are declared to be of full age at eighteen.<sup>2</sup> The statutes of each State should be consulted on this point, as well as on the point discussed in the next paragraph.

91. **When the period of infancy terminates.**—By the common law a person attains his majority—becomes of full age—on the last day of his twenty-first year—that is, *the day before his twenty-first birthday*.<sup>3</sup> As the law does not take account of fractions of a day, it is possible for one to attain his majority nearly forty-eight hours before he is actually twenty-one years of age. Suppose A was born just before midnight on January 1, 1890. That fraction of an hour is counted in law as one day. At midnight he is a day old, and he attains his majority at the first minute

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<sup>1</sup> In Iowa, Louisiana, and Texas, an infant of either sex becomes of age upon marriage. In Maryland and Oregon a female infant becomes of age at eighteen, if married. In Washington her marriage to a man of full age renders her of legal age. In Nebraska a woman attains majority at sixteen, if married.

<sup>2</sup> Such is the rule in Arkansas, California, Idaho, Illinois, Iowa, Kansas, Maryland, Minnesota, Missouri, Nebraska, Nevada, North Dakota, Ohio, Oregon, South Dakota, Vermont, and Washington.

<sup>3</sup> In California, North Dakota, and South Dakota a male infant becomes of age on the twenty-first, and a female infant on the eighteenth birthday.

of December 31, 1910, or immediately after midnight between December 30 and December 31. While this method of reckoning prevails in most of our States, it has been modified by statute in some of them.

**92. The legal force of infants' contracts.**—There is much authority, both in England and in this country, for the statement that an infant's contracts are absolutely void, if they are clearly harmful to him; that they are binding upon him if entered into for necessities, and that they are voidable if beneficial to him but are not for necessities.

The better view is, however, that an infant's contracts of every kind (*except the contract of marriage*) are voidable and only voidable. Upon attaining majority he may ratify them, whether they are advantageous or disadvantageous to him; and until he does so ratify them he can successfully defend any action at law brought against him for their enforcement.

**93. Agreements by infants for necessities are not true contracts.**—The liability of an infant for necessities which he has bought and used does not form a real exception to the foregoing doctrine. True, an action can be maintained against him, by the one supplying the necessities, but the recovery will be based, not on the infant's promise, but on the obligation which the law imposes on him. For example, an infant orders a suit of clothes of a tradesman and promises to pay forty dollars for it. He receives the suit and wears it out, but pays no part of the price. When sued he pleads and proves his infancy, and the tradesman proves the agreement. The tradesman is not entitled to recover forty dollars upon that evidence. He must go further, and prove that the fair value of the suit was forty dollars. If the evidence shows that the suit was worth only thirty dollars he can not recover more. It is clear, therefore, that the recovery against the infant is not on the agreement which he entered into. The law does not enforce the promise which he



made. His engagement to pay forty dollars for the suit is not a true contract, and yet that is the only contract that he pretended to make. He did not contract to pay the fair value of the suit.

This liability of an infant to pay for necessities what they are reasonably worth is imposed upon him by law for his benefit. If his credit could not be irrevocably pledged for their fair value, he might be obliged to go without them, and thus be subjected to grievous hardship, though possessed of an ample estate. Tradesmen would be loath to trust him for anything if he were at liberty to repudiate every obligation.

94. **What are necessities?**—This question can not be answered in very definite terms. On the one hand, the word is not limited to those articles which are absolutely essential to the infant's existence. On the other hand, it does not include everything which the infant is able to pay for out of his income. Perhaps no more definite statement on this point is possible than that of an eminent English judge in a leading case: "Necessaries include such things as are fit to maintain the particular person in the state, degree, and station in life in which he is." Not simply food and clothing, but medicines, medical attendance, and educational advantages come within the term. Articles of mere luxury, and those which minister only to the taste or social enjoyment of the infant are not accounted necessities, but "luxurious articles of utility" may fall within the term. Finger-rings or earrings are not necessities, but cuff-buttons and a watch may be. Nor will these lose that character by being artistic and ornamental, if their cost is not out of proportion to the infant's means and station.

Courts are not disposed to lay down general rules on this subject, but to decide each case according to its peculiar circumstances, keeping in view the principle *that the liability of an infant for necessities is imposed upon him for*

*his benefit, not for the benefit of the tradesman.* Accordingly, we find them deciding that a horse, a carriage, or a bicycle is not a necessary, save in exceptionable circumstances, as when its use by the infant is prescribed by a physician, and that "tobacco, pipes, cigars, liquor, pistols, powder, saddles, bridles, whips, fiddles, and fiddle strings" are not necessities for infants.

**95. Ratification of contracts by infants.**—We have said above that an infant may ratify his contracts upon coming of age. Let us now inquire what amounts to a ratification. At common law no particular form was required. All that was necessary was a clear manifestation of the infant's intent to ratify or confirm the contract. But a mere acknowledgment that it had been made was not enough. The infant's words or acts must be such as to amount to a new promise. This common-law rule has been modified in England and in some of our States by statutes which require the ratification to be in writing and signed. Such legislation, it has been said, is designed to guard a person, upon coming of age, not merely against the results of youthful inexperience, but also against the consequences of honorable scruples as to the repudiation of contracts made during infancy.

A writing, substantially as follows, would satisfy the requirements of the statutes referred to:

NEW YORK, *December 1, 1901.*

I, Henry Smith, having promised to pay James Jackson one hundred dollars for a buggy bought and received from him, during my minority, do hereby ratify and confirm said promise, and bind myself, being now of full age, to its performance.

HENRY SMITH.

Even in a State where the common-law rule has not been modified, it is safer and better for the adult to have the ratification in writing; and if the former infant is willing to ratify at all, he should have no objections to putting his ratification in writing.

**96. Limitations upon the infant's right to repudiate.—**

An infant's privilege of repudiating or annulling his contracts is subject to some important limitations. If they are for necessities he must pay the reasonable value of what he received, as we have seen. If they are for interests in property of a permanent nature he can not recover what he may have paid without restoring to the other party what he has received under them. For example, if an infant buys land and gives a mortgage to the vendor for the price, he can not avoid the mortgage without restoring the title of the land to the vendor.

It seems to be settled, also, in England and in some of our States, that if an infant pays money on his contract, and enjoys the benefit of it, and then avoids it when he comes of age, he can not recover back the money he had paid. The courts, holding this view, declare that the privilege of infancy is to be used as a shield and not as a sword. Applying this doctrine, the New York Court of Appeals recently decided that a young woman, seventeen years of age, who bought a bicycle on the instalment plan, and repudiated the contract after using the wheel four months, could not recover the money she had paid toward the purchase price. The defendant in this case proved that the use of the wheel, including the deterioration in value, equaled the sum paid by the infant, viz., \$26.25.

It must be admitted, however, that the weight of judicial authority in this country is opposed to the doctrine just stated, and accords to the infant, upon repudiating his contract, the right to reclaim from the other party money paid or property transferred, even though he may have wasted, injured, or destroyed what was received from the other party, and thus may be unable to restore it to him. In a recent Missouri case a minor sold a piece of land, received the price, went on a spree and spent it. Upon arriving of age a few months later he repudiated the sale and

was allowed to recover the land without repaying the price. Said the court: "The privilege of repudiating a contract is accorded an infant because of the indiscretion incident to his immaturity, and if he were required to restore an equivalent when he has wasted or squandered the property, or consideration, received, the privilege would be of no avail when most needed." Even under this doctrine, it will be noticed, the infant, upon repudiating a contract, must restore any part of the consideration which is still in his possession.

It is to be borne in mind, also, that if a contract is executory—that is, if neither party has done what the contract calls upon him to do—the infant's right of repudiation is unqualified.

**97. Right to repudiate is personal to the infant.**—An infant's privilege of repudiating his contracts is limited to him. Neither the other party to the contract nor outsiders can take advantage of it. Undoubtedly, an adult who has contracted with an infant is in a bad plight. Unless he has been defrauded he remains bound, and must await the infant's decision to ratify or to rescind.

**98. Contract of marriage can not be rescinded by an infant, but a contract to marry can.**—Reference has been made already to the fact that the marriage contract of an infant can not be avoided. This is because marriage is something more than a contract. It is a relation of the parties from which neither is allowed to withdraw without the express consent of the State. A contract to marry is not subject to such consideration. From it an infant may withdraw with impunity. It is voidable at his or her option, precisely as is a contract to buy a house or to rent lodgings.

**99. The contracts of lunatics and drunkards.**—Concerning the liability of insane and drunken persons upon their contracts, the law is more or less uncertain.

If the lunatic has been judicially declared insane, or the intoxicated person has been judicially declared an habitual drunkard, and a guardian or trustee has been appointed for him and his property, his inability to contract is generally absolute. Again, if the lunatic or drunkard is totally bereft of reason, a person who attempts to contract with him is guilty of fraudulent and dishonorable conduct, and a court will have little hesitation in annulling such a contract at the request of the defrauded party.

The cases which trouble the courts, however, are those where the insanity or drunkenness of one party is unknown to the other when the contract is made. On the one hand, it is urged that no true contract exists, because one party has not a consenting mind, and mutual assent—the meeting of sane minds, the understanding of the matter agreed upon in the same sense—is absolutely essential to a contract. On the other hand, it is said that whenever the sane person has no reasonable cause to believe the other party to the contract is insane or drunk, and does not take advantage of any delusion or stupor observable by him, he ought not to lose the fruits of his contract; that it is fairer and safer to hold the insane or drunken person to his agreement than to give him the option of avoiding it. To lay down the hard and fast rule, that contracts by drunkards or lunatics are voidable, it is argued, would be to encourage unscrupulous people to feign unsoundness of mind, and would result in a vast amount of dishonest litigation.

**100. The English rule. American modifications.**—The latter view has prevailed in England, and the rule in that country seems to be settled as follows: “A contract made by a person who is drunk or of unsound mind so as to be incapable of understanding its effect, is voidable at that person’s option, unless the other contracting party did not believe and had not reasonable cause to believe that he was drunk or of unsound mind.”

In many of our States, however, the doctrine is maintained that the contract of a person so insane or drunk as to be incapable of understanding its effect is voidable at his option, whether such mental incapacity was known to the other party or not, unless the contract has been executed, and it is impossible for the drunkard or lunatic to restore the property he has received, or, for some other reason, to put the other party in substantially the same position he was in before the contract was performed.

### § 3. ILLEGAL AGREEMENTS

**101. Illegal promises not enforceable by the law, and hence not contracts.**—From the very definition of a contract, as a promise enforceable by the law, we should conclude that an agreement to do what is illegal could not take effect as a contract, although it was made for a valuable consideration, between parties capable of contracting, who intended to be bound by it. The law is not so futile as to aid a party in recovering compensation for doing what it has commanded him not to do. “If one bind himself to kill a man, burn a house, or the like, it is void,” says one of the early writers on the common law, and such is still and must always remain the rule.

**102. Express prohibition or criminality of promise not essential.**—Nor is it necessary that the act called for by the agreement be one which is positively prohibited by law in express words, or which is punishable criminally. It is enough that it is clearly opposed to the spirit and policy of a statute, or of a rule of the common law.

Accordingly, contracts have been annulled by the courts, which were made for the purpose of cheating, defrauding, or swindling other parties; or for grossly immoral purposes; or for the cornering of markets or for the sale of “futures.” Contracts for “futures” are so named because

they are nominally for the sale and future delivery of articles, such as corn, wheat, or stocks, but in reality are mere gambling transactions. The buyer never intends to receive nor the seller to deliver the goods contracted for. The parties are in reality betting on the market price at the future day named in the contract, and all that the losing party is to pay the other is the difference between the contract price and the market price. Following is a specimen of such a contract, taken from an Illinois case:

**ALFRED V. BOOTH, Grain and Provision Broker.**

Chicago, Aug. 16, 1899.

10 Weare Com. Co.                      C. 31  $\frac{1}{2}$ .                      Paid.

Good till close of change, Sat., Aug. 26, 1899.

WEARE C. Co.

The meaning of this document is that the Weare Commission Company gave to Booth an option to buy, on or before August 26, ten thousand bushels of corn at thirty-one and a half cents per bushel.

**103. Other instances of illegal contracts.**—An agreement to work as a lobbyist or to pay for such work is void, because it tends to corrupt the public service. So is one to abstain from reporting a crime or from assisting in its prosecution, for it tends to pervert or obstruct the course of judicial proceedings. We can not undertake, however, to enumerate the various classes of contracts which have been pronounced illegal and therefore void. We must say something, however, of "contracts in restraint of trade," as they are called—that is, of contracts by which persons bind themselves not to carry on business of a certain kind.

**104. Reasons for holding contracts in total restraint of trade void.**—They are summarized as follows in a leading Massachusetts decision, which declared void a bond binding the maker never to carry on or be concerned in iron found-

ing: “ (1) Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons, for the sake of gain, to deprive themselves of the power to make future acquisitions. And they expose such persons to imposition and oppression. (2) They tend to deprive the public of the service of men in the employments and capacities in which they may be most useful to the community, as well as themselves. (3) They discourage industry and enterprise, and diminish the products of ingenuity and skill. (4) They prevent competition and enhance prices. (5) They expose the public to all the evils of monopoly.”

That case was decided in 1837, and fairly represents the law as it was then understood in England and in this country. But with a change in trade conditions has come a change in the law on this subject—a change which has been recognized and enforced by the House of Lords in Great Britain and the Supreme Court of the United States.

**105. Rule laid down by House of Lords and Supreme Court.**—The present rule is, that a contract in restraint of trade is not necessarily void. Whether it is to be upheld or annulled depends upon two considerations: First, is it harmful to the public welfare? Second, is the restraint upon the party seeking to repudiate the contract greater than is required for the protection of the other party?

The contract before the United States Supreme Court, in the case which laid down the foregoing rule, was between two gas companies of the city of Baltimore, to the effect that one of them should not put down any more pipe, and that competition between them should cease. As this contract was intended to secure to the parties a monopoly of the gas business within the city and an undue increase in the price of gas to the people, the court held it to be illegal and void as harmful to the public welfare.



A modern Rhode Island case illustrates the second consideration referred to by the Supreme Court. The defendant, who had been a successful teacher of French and German in plaintiff's school, agreed for a consideration not to teach those languages, nor to advertise to teach them, nor to be connected with any person or institution teaching them, within a year after leaving plaintiff's employment. The contract was held void, because the restraint imposed upon the defendant was greater than the plaintiff's protection required. Had the restraint been confined to the city of Providence, where plaintiff's school was situated, the contract would have been upheld, but as it extended to the whole State, the court believed that it oppressed the defendant, as well as deprived people in other parts of the State of the chance of learning the French and German languages from him without benefiting the plaintiff.

106. **Public policy an unruly horse.**—It must be confessed that the judicial decisions upon this topic are not entirely consistent, and that courts have not infrequently illustrated the truth of a learned judge's remark, that "public policy is a very unruly horse, and when once you get astride it, you never know where it will carry you." The modern tendency appears to be not to extend, but rather to limit the doctrine that contracts are to be annulled, because, in the opinion of the court, they are against public policy. A very able judge, who did much to further this tendency, left on record this statement, which should be heeded by every judicial tribunal: "If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting; and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by the courts. Therefore you have this paramount public policy to consider, that you are not lightly to interfere with the freedom of contract."

**107. Stifling competition and monopolizing trade.**—Over against such considerations it is proper, undoubtedly, to set the harmfulness of monopolies, the tyrannical tendencies of great combinations, whether of capital or of labor, and the disposition of the managers of many “trusts,” as they are popularly called, to fleece the public. The courts may well continue to annul contracts entered into for the formation and conduct of such enterprises, and wise and sane legislation may be needed for the correction of such evils. To quote from a recent decision of the New York Court of Appeals: “Contracts by which the parties to them combine for the purpose of creating a monopoly in restraint of trade, to prevent competition, to control and thus to limit production, to increase prices and maintain them, are contrary to sound public policy and are void.”

#### § 4. WANT OF MUTUAL ASSENT

**108. Cases of apparent but unreal assent.**—We have seen that a true contract involves the mutual assent of the parties to that which is contracted for. This assent must be real. If either party can show that his assent was apparent and not real he can escape from his promise, unless the appearance of assent was due to his own fault. Cases of apparent but unreal assent fall under the heads of mistake, misrepresentation, fraud, duress, and undue influence. Let us consider them in that order.

**109. Nature and consequences of mistake.**—Cases where the unreality of an apparent assent is due solely to *mutual mistake* are quite rare. They fall within one of the two following classes: (1) Mistake due to the act of a third party. (2) Mistake as to the existence or identity of the subject-matter of the contract. Whenever such a mistake occurs there is in law no contract, although there is in fact a semblance of one.

In some cases, of still rarer occurrence, *the mistake of one party* respecting the subject-matter, or respecting the identity of the other party, prevents an apparent agreement from taking effect as a valid contract. Perhaps the following illustrations will make the foregoing statement somewhat clearer.

**110. Mistake by one party to the contract.**—A liveryman, X, has been accustomed to buy oats from a produce-dealer, Y. The latter knows that the former never buys nor uses new oats, that he buys old oats only. X asks the price of oats for his own use, and Y gives him a price, which is the market price of old oats, and a little above the market price of new oats. X orders a hundred bushels at the specified price. Y sends new oats, which X refuses to keep or pay for. Is X under a contract obligation to take the oats and pay the price?

If we look only at the words used by the parties there appears to be a valid contract for the sale and purchase of one hundred bushels of oats, whether new or old, at a given price. But, if we go back of the words to the intention of the parties, do we not discover that their minds never met upon the subject of selling and buying *new oats*? Of course, if X had never in any way advised Y that he bought only old oats he would have been bound to take and pay for the oats delivered. His mistake, undisclosed to Y, could not affect the latter. If, however, Y knew that X not only thought he was bargaining for old oats, but that X thought Y was offering old oats, when in fact he was offering new oats, then Y is in no position to insist that their minds ever met on the proposition to sell and buy new oats. The assent, although apparent, is unreal, and there is no valid contract.

The same result follows when one party knows that the other is mistaken as to the former's identity. M buys N's business. O, in ignorance of the sale, sends an order to N

for a quantity of goods. M ships the goods without advising O that he has succeeded to N's business. O is not bound to take or pay for the goods. As between O and M there was no meeting of minds which could lead to a binding contract.

**111. Mistake due to the act of a third party.**—In cases falling within this class the third party is generally a rogue. At times he assumes the worthy rôle of an agent for farming implements. He accosts an unsuspecting farmer and induces him to contract for the purchase of a harrow, a plow, a wheel-rake, or other article. A printed contract is presented to the farmer to sign. He writes his name under the printed form, and gives the matter no further thought. Some months later a neighboring banker calls upon him to pay a note for five hundred dollars, signed by him, payable to the order of the farming-implement agent and duly indorsed to the banker. He declares he never made any such note. Upon inspection, however, he finds that the signature is his, and that the rogue of an agent had so ingeniously framed the written contract that by cutting off a part of it and filling in one or two blank spaces, the remnant would have the appearance of an ordinary promissory note. Is the farmer under a contract obligation to pay five hundred dollars to the banker, who has bought the note before due, without any intimation of the fraud, and paid full value for it? He is not, unless he was negligent in signing the paper. He never intended to sign a note. In the language of the courts, "the mind of the signer did not accompany the signature, but was fraudulently directed into another channel by the fraudulent conduct of the rogue."

**112. Mistake as to the existence of the subject-matter.**—An illustration of this sort of mistake is afforded by the following case: A offers to sell, at a specified price, certain bales of cotton which B had seen in A's warehouse, and B

accepts the offer. It turns out that the warehouse and cotton had been burned up before the agreement was reached. Here is no contract. They were treating for the sale and purchase of a particular lot of goods; when these went up in smoke the possibility of a contract went also. There can not be a contract for the purchase and sale of what has passed into nothingness.

**113. Mistake as to the identity of the subject-matter.**—This is to be distinguished from a mistake as to the quality, properties, or value of a particular object. The two following cases bring out the distinction very clearly:

In the first case, M, the owner of a coin worth ten dollars, passed it to N by mistake for a half-dollar, and N, by a like mistake, passed it to O for a half-dollar. M was allowed to regain the coin from O upon tendering him a half-dollar. There was not mutual assent between M and N, nor between N and O to an agreement that this particular coin should be transferred as a fifty-cent piece. In the second case, X found a queer stone which he showed to Y, who offered him a dollar for it. X accepted the offer, received the money, and delivered the stone. It turned out to be worth several hundred dollars. A valid contract was made, and X can not recover the stone.

In the case of the ten-dollar coin the parties were contracting for a fifty-cent piece, and mistakenly thought this coin was one, when it was not. In the case of the stone, they were contracting for that particular article and no other. There was no mistake as to the subject-matter of their agreement. Their assent was mutual and unequivocal. That one or both misjudged the value of the stone did not prevent the formation of a valid and binding contract, in the absence of fraud on the part of the buyer.

**114. Nature and consequences of misrepresentation.**—This word is used frequently to describe a fraudulent or dishonest representation, but as a technical legal term it sig-

nifies an *innocent misstatement of some matter of fact*, by one party to a contract. It differs from mistake, which we have just discussed, both in its character and its consequences. It does not go to the very root of the agreement, but is concerned with something which is preliminary or collateral to it. As a rule, therefore, it does not prevent the formation of a contract as a mistake does, nor does it render it voidable, as, we shall see presently, fraud does.

The following is a typical case of misrepresentation: A had a number of horses which he was about to sell at auction. The day before the sale B was examining one of them, when A said to him: "You have nothing to look for. I assure you he is perfectly sound in every respect." B replied, "If you say so, I am satisfied," and desisted from his examination. On the next day he bought the horse at auction, and the animal turned out to be unsound. Before the bidding began at the auction, A announced that the horses would be sold without any warranty of soundness, and that bidders must trust to their own examination and judgment. When B discovered the horse was unsound he tendered him back to A and demanded the price he had paid, on the ground that A's misstatement, though made innocently, rendered the contract voidable. But it was held that B was bound by the contract. A's misstatement was made during the preliminary negotiations, and formed no part of the contract of sale. The announcement by A at the opening of the auction gave B fair notice that the talk of the previous day was not to be a part of the contract.

**115. Misrepresentation may be made a term of the contract.**—In the case just considered, if B had informed A before bidding on the horse that he would not buy the horse nor keep him unless he was sound, and A had replied, "I assure you he is sound in every respect," then this misstatement, though innocent, would have been a fundamental term of the contract, and B would have had the right to

say to A: "My contract with you was not for this horse, whether sound or unsound, but for this horse *provided he was sound*. As he is not sound, the bottom has fallen out of the contract. You must take back the horse and pay back the price."

116. **Practical wisdom of this rule.**—The rule, that innocent misrepresentations shall not affect a contract unless they form a part of its terms, has been applauded by an eminent writer as "an instance of the practical wisdom which marks our law of contract. The process of coming to an agreement is generally surrounded by a fringe of statement and discussion; and the courts might find their time occupied in endless questions of fact, if it were permitted to a man to repudiate his contract, or bring an action for the breach of it upon the strength of words used in conversation preceding the agreement."

117. **Fraud: meaning of, in law of contracts.**—Fraud, as the term is used in the law of contracts, may be defined as *a wilful or reckless misstatement of fact by one party for the purpose of inducing and actually inducing the other party to assent to the terms of the contract*. It differs from mistake, which we considered on a previous page, in that the error is not mutual; only the defrauded party is mistaken. It differs from misrepresentation in that the misstatement is not innocent but is culpable.

We have used the word culpable rather than wilful or conscious because it is well settled that a misstatement made recklessly has the same legal consequences as one made wilfully. Here is an illustration: A is anxious to sell certain land. He has never seen it, and does not know its condition. To induce B to buy it he states positively that it has fine buildings, is well watered, and produces large crops. He hopes all this is true, but he knows that he has no information about it, and as a matter of fact there are neither buildings nor water on the premises, and the

land is unproductive. Surely such conduct is indefensible in morals, and the law declares that, if it induces B to buy the land, it is fraudulent.

**118. Fraud involves the idea of active misconduct.**—The reader is not to understand, however, that the rule of law on this subject is as broad as the rule of ideal morality. A man is not required by the law to disclose to a party with whom he is negotiating for a contract, all the information which he has on the subject. Each party must take care of himself. The golden rule is so far above the accepted code of business men that courts would be quixotic in attempting to apply it to business dealings. *Mere failure, then, to disclose the truth is not fraud.*

This is well illustrated by a decision of the United States Supreme Court, rendered many years ago by Chief-Justice Marshall. The case grew out of a sale of tobacco at the close of our second war with Great Britain. When making the contract the buyer knew that peace had been concluded between the countries, and that the price of tobacco would advance at once from thirty to fifty per cent. The seller was ignorant of the conclusion of peace, and the buyer knew he was ignorant of the fact; yet the court declared that the buyer was under no legal duty to tell him anything; that if the buyer did not say or do anything tending to impose upon the seller there was no fraud. In other words, there can not be a fraud, in the legal sense of that term, without something in the nature of active misconduct.

**119. Non-disclosure of the truth in connection with other circumstances.**—A person who takes advantage of the ignorance of another, as in the tobacco case just referred to, is in a perilous situation. A very slight misstep may plunge him into the abyss of fraud. Let us refer to the tobacco case again for illustration of our meaning. It appeared, in this case, that the buyer had been negotiating with the seller for the tobacco before the news of peace



had been received, and that when the buyer renewed the negotiations, after getting the news, the seller asked if there was any news calculated to advance the price; that the buyer did not answer the question, and the seller did not insist on an answer. Upon these facts, the judge, before whom the case was tried, charged the jury that there was no fraud on the part of the buyer. But the Supreme Court held that it was not absolutely certain that no imposition had been practised by the buyer, and that, whether the non-disclosure of the truth, taken in connection with the other circumstances, amounted to fraud, was a question for the jury.

It should be borne in mind, therefore, that the line which separates *non-disclosure* from *suppression* of truth is often dim and shadowy, and that a man who attempts to make a sharp bargain and still keep on the windy side of the law needs to have all his wits about him. "He who would sup with the devil must have a long spoon."

It is to be borne in mind, also, that one may perpetrate a fraud upon another, although telling nothing but the truth. His non-disclosure of other things may so alter the effect of what he actually says as to produce a false and misleading impression. It is the case of "a lie which is half the truth"; and while the law does not declare it the "blackest of lies," it does adjudge it a fraud. For example, a man who wished to be trusted for a bill of goods, was asked by the seller "how he stood." He gave a truthful statement of the property he owned, but said nothing of what he owed, although his debts nearly equaled the value of his property. "To tell half a truth," said the court, "is, in such a case, to conceal the other half. Concealment of this kind amounts to a false representation."

**120. Acts may speak louder than words.**—Fraud may be practised without the use of speech. A manufacturer or dealer who paints a step-ladder for the purpose of conceal-

ing a defect in the wood, or who plugs a hole in a gun-barrel to prevent its discovery, and sells the article to one who is misled by its safe appearance, defrauds the buyer as truly as though he had declared in the clearest terms that the ladder or the gun was without defect and safe for use.

**121. Misstatement of fact, not of opinion.**—In our definition of fraud it was intimated that the misrepresentation must be one with respect to a matter of fact, as distinguished from a matter of opinion. The reason for this is that the law does not undertake to help a man who does not help himself—does not attempt to save him from the natural consequences of his own folly.

A offers his horse for sale and asserts it is worth five hundred dollars. Is he stating a fact or expressing an opinion? Clearly, the latter. How would the ordinary horse-buyer treat such a statement? Why, simply as a piece of “seller’s talk,” no more to be relied on than the pathetic and voluble appeals of an auctioneer to the bystanders not to force him to knock down his wares at such “a perfectly ruinous rate.” But suppose A declares that the horse has trotted a mile in two minutes. Here, certainly, is a statement of fact; one, too, which the most experienced and shrewdest horse-dealer would consider of importance when deciding whether to buy the horse. If B buys, relying on the truth of that statement, and the horse has never trotted faster than a mile in three minutes, he has been defrauded.

**122. Misstatement of fact, which buyer ought not to rely on.**—According to some authorities, a false statement of what the seller paid for the article is one which the buyer ought not to rely on. Consequently, if he does permit it to induce him to buy, he has only himself to blame; he can not hold the seller for fraud. The courts taking this view follow a decision of Lord Mansfield, in which that great judge declared that a false statement as to what the seller had paid for an article was such as was made “by every

seller every day, who tells every falsehood he can to induce a purchaser to purchase."

This doctrine has been repudiated in England and in many of our States. It is a survival from an age long past, when Hermes, the god of markets, was also the god of liars and of thieves. The development of market usages and law has been away from the patronage of such a divinity, and in the direction of good faith, fair dealing, and personal probity. A state of millennium has not yet been reached, and the law still tolerates a good deal of lying on the part of sellers, but it tolerates far less than it did in Lord Mansfield's time.

**123. False statement need not be the sole inducement.**—Not only must the false representation be one of fact, and made with the intention that it should be acted on by the other party, but it must accomplish its purpose; it must deceive the other party and lead him to act as he would not have acted had it not been made. It is not necessary, however, that the falsehood be the sole inducement to his action. It is enough that it is one of the inducements. Accordingly, if A falsely represents that the carpets, covering a number of rooms as well as the hall and stairs in his house, contain about nine hundred yards when he knows they contain only five hundred, he is liable in fraud to a buyer who believes the statement, although the latter goes through the house and makes a rough estimate of the floor space. It is no defense for one who intended to deceive and who did deceive another by a false statement of fact, that the victim might have discovered the falsity had he been sufficiently suspicious and active.

**124. The rights of the defrauded party.**—The consequences of fraud are quite different from those of mistake or of innocent misrepresentation. *Fraud renders the contract voidable by the dupe but not by the deceiver.* Certainly the victim can say that he did not consent to the

terms of the contract as it was made. Take the case of the carpets, referred to in the last paragraph. The buyer consented to the purchase of nine hundred yards of carpets for a specified sum; he never consented to the payment of that sum for five hundred yards.

But while the defrauded party is entitled to avoid the contract, and recover anything which he has paid under it, the law does not limit him to this course. It permits him to affirm the contract, and to sue the defrauding party for damages which the fraud has caused.

**125. Disaffirmance must be made promptly.**—If he wishes to avoid the contract he should act promptly upon finding that he has been deceived. The acceptance of any benefit under the contract, after the fraud is known to him, will preclude him from avoiding it thereafter. He will lose this right, also, if he so deals with the subject-matter of the contract or permits the other party so to deal with it, that upon a rescission of the contract, the defrauded party can not be put in the position he occupied before the contract was made.

Again, the right will be lost when innocent third parties have acquired an interest for value under the contract. For example: A sells goods to B, relying on B's false statement that he is worth a thousand dollars over all his debts, when, in fact, he is insolvent. If C buys the goods of B, and pays for them, A can not thereafter avoid his sale to B and reclaim the goods. Here, as in cases where he elects to affirm the contract, his only remedy is an action for damages.

**126. Duress. Its various forms and consequences.**—The most extreme form of duress is that of complete physical compulsion, as when one seizes the hand of another and guides it while it writes or signs a document. A contract executed under such circumstances is absolutely void. It has not even the apparent consent of the one whose name is

signed. The signature is not his act at all, but the act of the one who guided the hand.

Next to this is the duress which consists in coercing a person to do an act or to make a promise *by threatening his life* if he does not. Here he has the choice of doing the act or making the promise on the one hand, or, on the other, of losing his life. He chooses to do the act or to make the promise. Hence the act or the promise is not void, as is the case of overpowering physical compulsion; but as his consent was not freely given, the act or promise is voidable. If a person makes a will or a conveyance of property, or enters into a contract, under such duress, he may avoid it as against the coercer.

**127. Duress by threats of injury to person or property.**—The same rule applies to acts done or contracts made when one *is threatened with mayhem*<sup>1</sup>—that is, with the loss of a bodily member which is useful in fighting, such as an arm, a leg, an eye, or a front tooth. Mere threats of assault and battery, though made by a stronger and brutal man, and inspiring a well-grounded fear of personal injury, did not amount to duress at early common law, nor did threats of destroying one's house or goods, nor of wrongfully detaining them.

Blackstone supports this doctrine on the ground that if the threat is carried into effect the injured party may have satisfaction by recovering equivalent damages, while no suitable atonement can be made for the loss of life or limb. A better view is presented by Judge Metcalf in his work on Contracts. This doctrine, in his opinion, is characteristic of the age in which it had its origin, an age in which personal valor in defending one's person and possessions was encouraged, and resort to the law for the redress of assault and battery or attacks upon property was discouraged.

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<sup>1</sup> Originally written "maiheme"; ancient form for "maim."

The tendency in this country is to enlarge the scope of duress, and to give relief from contracts entered into under threats of battery or of destruction of goods. Even in England a person who pays illegal exactions in order to save his property from destruction, or to get it from one improperly refusing to surrender it, is allowed to recover such payments, on the ground that they were made without legal consideration.

**128. Duress by threats of imprisonment.**—Still another form of duress is practised by *threats of imprisonment*. Here, again, the early common law limited narrowly the operation of duress. The imprisonment threatened must have been unlawful; a person making a contract, under threats that he would be imprisoned for an offense which he had actually committed, could obtain no relief therefrom.

At present, however, the prevailing view in this country is, that although one is liable to arrest and imprisonment, if the threat to imprison him is made, not for the protection of the public and the punishment of the crime, but to overcome his will and force him to enter into a contract which he would not have made but for this, the contract is voidable by him.

**129. Threats against the contracting party's relatives.**—While it is the general rule that the threats of violence or imprisonment must be directed against the contracting party in order to operate as legal duress, exception is made in case of threats against the husband or wife, the parent, or child of such party. The exception rests upon the tenderness of the relationship between the person threatened and the one contracting. Threats to kill or to maim or to imprison a husband, a wife, a parent, or a child are ordinarily as coercive upon one's will as threats against one's own person.

**130. Duress must be caused or be adopted by the other party to the contract.**—In order that one party to a con-

tract may avoid it on the ground of duress, he must show that the other party is legally responsible for the coercion. It is not necessary, however, to prove that the latter actually and in person practised the duress. It is enough that he procured it; nay, even that he adopted or took advantage of it, with knowledge that the contract had been obtained by means of it. Such adoption or ratification makes him liable, precisely as if the coercive act had been expressly commanded by him and done under his very eye.

**131. Undue influence defined.**—Undue influence has been defined as consisting: (1) In the use, by one in whom confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage to himself. (2) In taking an unfair advantage of another's weakness of mind. (3) In taking a grossly oppressive and unfair advantage of another's necessities or distress.

Examples of the first class are afforded by certain transactions between attorney and client; between parent or guardian and child or ward; between a spiritual adviser and one of his flock; and between physician and patient, by which the dominant party obtains a benefit or advantage over the other. The law looks with suspicion upon every such transaction, and compels the attorney, or the parent, or the guardian, or the spiritual adviser or the physician to show that it was fair and honest; that the confidence reposed in him or the authority exercisable by him was not abused, but that the other party was fully advised as to his rights and allowed to choose and to act freely for himself.

**132. Relation of undue influence to fraud.**—All cases of undue influence are, in a sense, cases of fraud, and those falling within the second and third classes enumerated above are generally characterized by the courts as fraudulent. In this connection, however, "fraud" has a wider and less precise signification than that given to it a few pages

back. We then learned that false statements of opinion as to the character or conduct of third persons, or as to the value of property, or as to the advantages of a bargain, do not amount to fraud in its narrow, precise, common-law sense.

Such statements, however, are often very effective in unduly influencing young, inexperienced, weak-minded, or necessitous persons, and hence are unfair and fraudulent toward them. "Fraud," said Lord Hardwicke a century and a half ago, "does not here mean deceit or circumvention; it means an *unconscientious use of power arising out of the circumstances and conditions of the case.*" In the language of another judge, "*Whenever influence is acquired and abused, wherever confidence is reposed and betrayed,*" we have a case of undue influence.

**133. Rights of the victim of undue influence.**—The effects of undue influence upon a contract, obtained by its exercise, are quite similar to those of fraud, but not precisely the same. The contract is voidable at the option of the victim, but binding on the other party. Receiving benefits under the contract, however, with full knowledge that he has been victimized, will not preclude him from rescinding thereafter. Not until his will has thrown off the dominant influence which unduly controlled it, and has acquired the power to consent freely to the contract, is he held to be in a position to affirm it.

## § 5. PERSONS AFFECTED BY A CONTRACT

**134. Rights and obligations under a contract are generally limited to the parties.**—Having learned how a valid contract is made, let us now consider the parties who are affected by it.

We have seen that a true contract requires the mutual assent of the parties to its terms. It would seem to follow



from this that only the parties to a contract can be bound by it or entitled under it. A contracts to work for B a year for a thousand dollars. A has come under obligations to B and B has come under obligations to A, but neither one has assented to be bound by the contract to any other person. Accordingly, C can not claim A's services under this contract, even with B's assent, for A has not consented to work for C. So, too, D can not force B to accept his services under this contract in lieu of A's, although A may have requested D to act in his place.

**135. Substitution of third parties may be provided for in the contract.**—Of course A and B are at liberty to stipulate in their contract that either may substitute another in his place. Even without any such stipulation, the usages of business or the circumstances of the case may show that the parties intended to give this right of substitution. For example, A contracts to build a house for B. The latter knows that A can not do the work with his own hands, but that he is accustomed to hire workmen to do much of the manual labor, and to sublet parts of the job to masons, plumbers, and others. By entering into the contract with knowledge of such a usage, B impliedly consents to all that the usage permits A to do.

Even in such a case, however, B's obligation of payment under the contract is limited to A. A's laborers or subcontractors must look to him for their pay. They have no contract with B. He has assented, indeed, to A's employing others upon the job, but he has not assented to the splitting up of his liability to A among fifty or a hundred of A's workmen and subcontractors. If A gives to a laborer an order on B, the latter is not bound to honor it, even though he is owing A a much larger sum. He has a right to say: "I have agreed to pay B certain sums at certain times. I am ready to perform that agreement, but I decline to pay in dribblets to Tom, Dick, and Harry." He

may be as unaccommodating as Shylock, but, like Shylock, he has the right to stand upon what is "nominated in the bond," and to say "the law allows it."

The extent to which this right may be affected by A's assignment of his interest in the contract will be considered presently.

**136. Interference by outsiders with the obligations of contract.**—While the parties to a contract and they only can be made subject to its obligations, outsiders are not entirely free to interfere with its performance.

Some authorities go so far, indeed, as to lay down the rule that everybody is under a duty to respect the contractual tie; that if any third person knowingly interferes with it—for example, if he persuades either party to break his contract—he makes himself liable to pay damages to the contracting party injured by such interference.

Other authorities repudiate so broad a rule, and declare that the duty which rests upon outsiders is only to refrain from interfering with the performance of the contract in certain ways. They must not employ unlawful means, such as threats, violence, falsehood, or deception, to induce a party to break his contract, but they are not under an absolute duty to respect the contractual tie. The chief reason in support of this view is that the person who breaks his contract is liable to the other contracting party in damages; and that if he acts freely in breaking it, the legal as well as the moral responsibility for his act is upon himself, and can not logically be extended to others.

A recent decision of the English House of Lords appears to adopt this view, and the courts of last resort in several of our States are fully committed to it, while those of other States and the Federal courts prefer the broader rule first given. The topic, however, belongs to the law of torts, or civil wrongs, rather than to that of contracts, and will not be further discussed here.

**137. Rights of third persons under a contract.**—As stated above, the right to enforce a contract is limited generally to the parties: Although A has promised B, for a valuable consideration, to pay money or transfer property to C, the outsider C is not entitled at common law to enforce this promise against A. This appears sound upon principle, for A has never consented to be bound to C. Such is still the rule in England.

In this country various exceptions to it are recognized, the chief of which are the following: (1) A delivers property to B upon B's promise to turn it over to C, or to sell it and turn over the proceeds to C. If B fails to use the property as he contracted with A to do, C can sue him for the property or the proceeds. (2) Again, A is owing C a debt, and sells property to B upon his promising to pay the purchase price to C, in satisfaction, to that extent, of his debt to C. If B does not so pay, C can sue him for the price. (3) Still again, A sells a farm to B, who assumes a mortgage of one thousand dollars on it previously given by A to C, and the thousand dollars is deducted from the purchase price. If B does not pay the mortgage debt C can sue him therefor.

**138. Reasons for the American exceptions.**—In all these cases, it will be observed, there are special circumstances, which give C an interest in enforcing the contract, over and above the contract itself. Moreover, to permit C to sue B avoids one lawsuit, for if C could not sue B on his default, he would sue A, and then A would proceed to sue B. Accordingly, these exceptions are to be supported, if at all, upon the grounds (1) that they give the right of action to the party who, in most instances, is chiefly interested in enforcing the contract, and (2) they avoid a multiplicity of lawsuits.

## § 6. ASSIGNMENT OF CONTRACT

139. **Liabilities under a contract not assignable.**—The reason for this rule is very plain. A borrows a thousand dollars of B and promises to repay it three months thereafter. Clearly, B has assented to the contract because of his confidence in the character and financial responsibility of A. No one can be substituted for A without B's consent.

To be sure, in case of A's death, or of his bankruptcy—which is often called a business man's commercial death—B is compelled to look to A's personal representative (his executor or administrator) or to his trustee in bankruptcy for payment; but that is because it has become impossible for A to personally discharge his contract liabilities.

140. **The assignability of rights under a contract.**—At common law even the rights under a contract could not be assigned. Various explanations of this rule have been offered. Lord Coke attributed it to the "wisdom and policy of the founders of our law" in discouraging litigation, and preventing wealthy people from buying up claims for the purpose of oppressing the poor. The true explanation, however, seems to be that it "was a logical consequence of the primitive view of a contract as creating a strictly personal obligation between the creditor and debtor."

As our legal system has developed and improved, this rule has been modified from time to time. First, the *assignee was allowed to sue on the contract, but in the name of the assignor*. On the records of the court, therefore, the suit would still be between the parties to the contract. The next step was taken by *courts of equity*, which permitted the assignee *to sue in his own name*. The third and latest step was taken by the enactment of statutes, which grant the right to an assignee of a contract *to sue at law in his own name*. Thus has the primitive idea of a contract, as

creating strictly personal obligations between the parties, been superseded by the view that a creditor's right under a contract is property, which he may dispose of as he may of a horse or a hat. It is simply an example of common-law rules and conceptions undergoing a change so as to suit the needs of business. Suppose a merchant has sold thousands of dollars' worth of goods to various customers on a credit of six months. He needs to buy new goods. His money is locked up in these accounts against his customers. If he can assign the accounts to a bank he can get the money he needs; if he can not assign them he must go without the money. Surely the common law would not be the flexible and expanding system which it was declared to be in our second chapter if it could not modify the narrow rule and views of Lord Coke's time and adapt itself to the needs of ours.

**141. Notice of assignment should be given.**—As soon as an assignment of a contract right is made, the assignee should give notice thereof to the debtor. The reason for this rule is not hard to find. If the debtor is not notified of an assignment he is justified in supposing that the original creditor still owns the claim, and that payment to him will satisfy the debt. Of course if the creditor is honest he will refuse to take payment from the debtor in case the claim has been assigned, and will direct him to the assignee. Unfortunately, all creditors are not honest, and it often happens that an assignor takes payment from the debtor, fails to turn it over to his assignee, becomes insolvent or absconds, and thus the assignee loses all that he paid for the claim.

**142. Assignee is subject to defenses against his assignor.**—Not only must the assignee take care that the debtor is notified of the assignment, but he receives the claim subject to any defenses which the debtor could have urged against it in the hands of the assignor. For example, A

orders a car-load of sound and marketable potatoes from B at fifty cents a bushel. The latter ships unsound and unmarketable potatoes and assigns to C his claim for the price. C can sue on that claim in his own name, but A can defend on the ground that the potatoes were not such as he ordered, precisely as he could had the suit been brought by B. In other words, the assignee steps into the shoes of the assignor; he takes such title as his assignor had and no better. It is not uncommon, therefore, for the person who is asked to buy a claim to get a written statement from the debtor that he has no defenses to it.

When we come to the chapter on Negotiable Instruments we shall find that the law merchant secures to the *bona fide* transferee of such contracts a title free from most defenses against the transferors.

**143. Assignment by operation of law.**—Thus far we have been considering assignments voluntarily made by parties to contracts; but oftentimes contract rights or liabilities are assigned by operation of law. A party to a contract dies. The law transfers his contract rights, and to some extent, as already noted, his liabilities to his personal representative—that is, to the executor of his will, or the administrator appointed by the surrogate or similar officer to settle his estate. This has been the rule of English law from a very early period. Formerly marriage transferred to the husband all the contract rights and liabilities of the wife, but this form of transfer by operation of law has been abolished in England and in most of our States by statute. Still another method of transferring contract rights and liabilities by operation of law will be discussed in the chapter on Bankruptcy.

§ 7. DISCHARGE OF CONTRACT

**144. Executory contracts may be discharged by mutual consent.**—So long as a contract remains executory—that is, unperformed on both sides, the parties may discharge it by mutual consent. For example, A contracts to build a house for B for five thousand dollars. Before A has done anything or B has paid anything they mutually agree to cancel the contract. Surely, as the obligation sprang from the mutual promises, it must vanish with their withdrawal.

**145. Contracts executed by one party can be discharged only by performance or release.**—But suppose A has built the house and B has paid nothing or only a part of the price, will a new agreement between them, absolving B from further liability under the contract, discharge it? We have only to revert to the doctrine of consideration to discover that the question must be answered in the negative. B sustains no detriment, gives up no right in exchange for A's new promise. After A has performed his contract the only way in which B can be discharged from its obligation is by performance on his part or by obtaining a release under seal from A. Such a release may be in the following form:

*Know All Men by these Presents*, That I, A, of Buffalo, N. Y., for a valuable consideration, do hereby release and discharge B, of Cleveland, Ohio, from every claim or demand of any kind or nature.

*In Witness Whereof*, I have hereunto set my hand and seal this Tenth day of October, 1901.

(Signature.)

[Seal.]

Under modern statutes in many of our States, as we have seen, such a release would not be an absolute discharge unless a consideration was in fact received. At common law the seal, it will be remembered, dispensed entirely with proof of consideration; or, as it is sometimes

put, the seal was conclusive evidence of consideration. The statutes above referred to declare the seal is *prima facie* evidence of consideration—that is, the seal authorizes the presumption that a consideration was given, but that presumption may be overcome by evidence that none was given.

**146. Discharge by substitution of new contract. Novation.**—Another way of discharging a contract by the mutual consent of the parties is to substitute a new contract for the original one. Suppose, after A's agreement to build a house for B for five thousand dollars, B decides to change his plans and erect a smaller house. A assents to the change, and agrees to build this house for four thousand dollars. The original contract is discharged and the new one is substituted for it.

So a contract may be discharged by the substitution of a new one having different parties. X and Y as partners are owing Z five hundred dollars for goods purchased. The partnership is dissolved. X buys out Y, agrees to pay the firm debts, and Z assents to accept X as his debtor instead of the firm. The old contract is discharged by the substitution of a new one in its place, to which Y is not a party. This is often spoken of as a discharge by novation.

**147. A contract may be discharged by the happening of a stipulated event.**—Not infrequently a contract contains a provision that it shall cease to be binding at the option of one of the parties, or upon the happening of a certain event. An example of the former is the sale of a horse upon condition that the buyer may return him and receive back the purchase money within a fixed period if the horse does not suit him. An ordinary insurance policy is an example of the latter. It provides, among other things, that if the insured premises are used so as to increase the risk, or if they remain unoccupied for more than a specified number of days, the policy shall be void.



148. **Discharge by performance.**—The commonest method of discharging a contract is that of performance by both parties. Of course, either party is discharged from his obligation as soon as he has performed what he has agreed to do, but performance by one party only does not discharge the contract. A sells and delivers an article to B. If it conforms to the contract A's obligation is at end, but B remains bound until he pays the price. On the other hand, B may pay for the article in advance of receiving it, and thus discharge his contract liability, while A remains bound by his.

Money is the ordinary medium of payment, but a contract may provide for payment by negotiable paper, by the transfer of land, or of a chattel. Even when the contract calls for payment in money the creditor may waive this stipulation and accept negotiable paper, a horse, a wagon, or any other article. When, however, a debtor is allowed to give his promissory note or check, instead of cash, his contract obligation is not discharged *unless the creditor agrees to accept the note or check as absolute payment*. It is true this agreement need not be in express words. It may be implied from the circumstances of the case. But in the absence of an agreement, either express or implied, the note or check operates only to suspend the debtor's obligation. If the note is not paid when it falls due, or the check when it is duly presented at the bank, the creditor may sue the debtor on the original contract.

149. **Tender of performance.**—At times one party to a contract refuses to allow the other to perform. In such a case the latter *may offer to do what the contract binds him to do—may tender performance*. If his obligation is to do an act other than the payment of money, his offer to do it, made at the agreed time and place, although the other party refuses the tender, discharges him from further liability. If his obligation is to pay money, his tender of

performance at the proper time and place does not discharge; it only relieves him from interest and the costs of a suit thereafter brought by the creditor. A tender of payment, even to have this effect, must be unconditional; must be of the exact sum, and must be made with money which is a legal tender for debts, in the place where tender is duly made.

**150. Legal-tender money of the United States.**—In this country the Federal Constitution and statutes regulate the subject of legal tender. By Article I, section 10, of the Constitution, the States are prohibited from coining money and from making anything but gold and silver coin a tender in payment of debts. The United States statutes provide for the coinage of various gold, silver, and minor coins, and for the issue of paper money. The gold coins comprise a quarter-eagle, or two-and-a-half-dollar piece, a half-eagle, an eagle, and a double eagle. The silver coins are the dollar, the half-dollar, the quarter-dollar, and the dime. The minor coins are the five-cent piece and the penny.

Gold coins of the United States, the United States notes, commonly known as greenbacks, and certain demand Treasury notes, are a legal tender in the payment of all debts, and silver dollars “for all debts, except where otherwise expressly stipulated in the contract.” The silver coins below the dollar are legal tender for an amount not exceeding ten dollars in any one payment; while the minor coins are a legal tender for an amount not exceeding twenty-five cents in any one payment.

**151. Consequences of breach of contract by one party.**—A person who breaks his contract does not thereby discharge himself from its obligation, although his breach may discharge the other party from further liability under the contract. In some cases a court of equity will compel the contract-breaker to specifically perform his contract. As a rule this will be done when, and only when, the recovery of money

damages will not be an adequate remedy. If A contracts to sell his horse to B, and then breaks his contract, B can not force A to specifically perform, by turning over the horse to B and receiving his money. It is a case, the courts say, where B can be compensated for the breach by money damages. With the money he can buy some other horse. If, however, the thing contracted for is not such as can be duplicated in the market, a court of equity will compel the seller to give title to the thing to the buyer. A house, farm, or other real property generally falls within this class. So, it has been held, does "a silver tobacco-box, adorned with several engravings of public transactions and heads of distinguished persons," or "a china jar of unusual beauty, rarity, and distinction," or a patented article.

**152. When does a breach by one party discharge the other?**—While the contract-breaker remains liable under the contract, his breach may be of such a character as to discharge the other party entirely. Whether it will have this effect or not generally depends upon the question whether it is of a *fundamental term of the contract*; or, as it is sometimes said, whether it goes to the *very root of the contract*.

This is admirably illustrated by two cases, one decided by the Court of Queen's Bench in England, the other by the Supreme Court of the United States.

**153. Breach of a term, which is not of vital importance.**—The plaintiff in the English case, a professional singer, had contracted with the defendant, director of the Royal Italian Opera in London, to sing in concerts and opera for a stated period. One of the provisions of the contract bound the plaintiff "to be in London without fail six days before the commencement of his engagement, for the purpose of rehearsals." He did not reach London until two days before the commencement of his engagement, and defendant insisted that this breach discharged him from the

contract, and he refused to employ or pay the plaintiff. The court, however, decided against the defendant. It examined the contract carefully, and, finding no express statement by the parties that this provision was of vital importance, declared that it must "look to the whole contract, and see whether the particular stipulation goes to the root of the matter, *so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant had stipulated for*; or whether it merely partially affects it, and may be compensated for in damages." Applying this principle to the contract in suit, the court held that the provision as to the time of arrival in London was not of vital importance—did not go to the root of the matter.

Had the plaintiff failed to be present on the opening night of the opera season, his breach might have gone to the root of the contract, and discharged the defendant. It certainly would have had that effect, had it compelled defendant to engage some other singer in plaintiff's place for the season, or had it forced him to withdraw an opera which had been advertised for that evening, and thus to lose heavily in money and reputation.

154. **Breach of a vital or fundamental term.**—The case decided by the United States Supreme Court illustrates a breach of this character. The plaintiffs contracted to ship five thousand tons of iron rails from European ports to defendants in Philadelphia, at the rate of about one thousand tons per month, beginning in February, 1880. Only four hundred tons were shipped in February, and eight hundred tons in March. As the market price of such rails had fallen, after the contract was made, the defendants were anxious to get rid of it, and the plaintiffs were equally anxious to hold to it. Plaintiffs' failure to ship the stipulated amount each month was such a breach of the contract, the defendants insisted, as discharged them from all liability

under it. Accordingly they refused to receive or pay for any rails tendered to them. It will be observed that plaintiffs' breach could not cause any loss to defendants, as the market price had fallen, and rails could be bought at a lower figure than that named in the contract. Defendants, therefore, were seeking to be relieved from this agreement in order to save themselves from a loss, which they would have sustained had the plaintiffs shipped the rails on time.

The court, in deciding for the defendants, laid down the following principles: "*In the contract of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily regarded as a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract.*"

**155. Effect of repudiation of contract by one party, before performance by him is due.**—Another question of importance, and one upon which, unfortunately, our state courts disagree, is whether a party is entitled to consider himself discharged from a contract and to sue for damages, as soon as the other party gives notice of his intention not to perform.

The prevailing view in this country, following that which obtains in England, is that he may. Very recently, the Supreme Court of the United States has declared in favor of this view. In the case before that court a hop-dealer on the Pacific coast contracted to sell to a dealer in New York one thousand bales of hops, to be delivered in lots of one hundred bales, at stated dates, during a period of five years. After receiving six hundred bales the buyer notified the seller that he would not take any more hops. Suit was

brought at once by the seller, and the court held that it was well brought at that time; that he was entitled to treat the notice as "an anticipatory breach" of the remainder of the contract, and to recover such damages as he could prove that he had sustained. He proved that the price of the hops fixed by the contract was twenty-two cents a pound; that at the time he received the notice (which was the time of the "anticipatory breach"), he could have made contracts with others for the remainder of the hops, at nine cents a pound for the year 1896 and at eleven cents for the year 1897. Accordingly, he recovered a judgment for \$10,-118.30.

## CHAPTER IV

### AGENCY

#### § 1. HOW THE RELATION IS FORMED AND TERMINATED

156. **Definition of agency.**—An agent, using the term in its broadest sense, is one who acts for and represents another, styled his principal; and *the legal relation existing between such persons is called agency.*

157. **Agency may result from appointment or from ratification.**—As a rule, the agent receives his authority to act for and represent the principal before he does anything on the latter's behalf. But at times he does not. For example, A, knowing that B is anxious to sell certain property at a certain price, learns that C is willing to buy it. He is not B's agent. B has neither requested nor authorized him to sell the property. Nevertheless, he undertakes to sell and deliver it to C on B's behalf. He tells B what he has done, and B approves of the act. What is the legal effect of the transaction? Precisely the same as though B had authorized A to sell the property as his agent. *This adoption of the acts of an unauthorized agent is known as ratification;* and it is a well-established maxim that the subsequent ratification of an act is in law equivalent to a precedent authority to do it. Hence, agency may be created by ratification as well as by previous appointment.

158. **Conditions of ratification.**—It is not to be understood, however, that one can ratify any and every act done by another. Without attempting to discuss this point fully,

we may say that the chief conditions of ratification are these: 1. *The one doing the act must profess to do it, on behalf of an existing principal.* Two illustrations will suffice to bring out clearly the meaning of this rule. A, without any authority to act for B in the matter, contracts in his own name and for himself alone to buy wheat of C. This contract of purchase can not be ratified by B and thus become his contract. B may, indeed, buy A's interest in the contract, but he can not make A's act his act, for, when it was done, it was not done on his behalf. Again, those who are engaged in organizing a corporation—"promoters," as they are often called—frequently employ persons or buy property while thus engaged. Such contracts of hiring or of purchase are not ratifiable by the corporation when it comes into existence. Of course, if the corporation takes the benefit of the services or of the property, it may be liable therefor, but such liability ought to rest, and the courts generally declare it does rest, on the corporation's own contract made when it receives or retains the benefit. That this is the true ground of liability is apparent the moment we consider the consequences of ratification.

We have pointed out, already, that a ratification is equivalent to a previous authority. That is, the act, which is ratified, is treated as though it had been authorized before it was done. Accordingly, *the rights and liabilities of the principal, the agent, and the third party will date back to the original act.* To say, therefore, that a corporation can ratify an act done before it is organized is to say that one can enter into a contract, or commit a tort before he is born.

2. Another condition of a valid ratification is that *the approval of the act be given with full knowledge of all the facts.* An approval brought about by mistake or fraud is not binding as a ratification.

3. *The act can not be ratified in part and repudiated in*



*part.* To illustrate: Suppose A, without B's authority, sells the latter's horse to C and warrants it to be sound. He receives the price and pays it over to B, making a full statement of what he has done. If B keeps the money he is bound not only to let C keep the horse, but he is bound also by the warranty of soundness. He can not ratify the sale without ratifying the warranty also, for they were parts of a single transaction.

159. **Agency by operation of law.**—Thus far we have been considering agency as the result of an agreement between the principal and the agent. This is the way in which the relation ordinarily arises. As a rule, it is not forced upon the parties. The principal is at liberty to choose his agents, and an agent is equally free to select his principal. However, there are two important exceptions to this rule. Under the first exception we have *agency by estoppel*; under the second, *agency by necessity*. In each of these cases *the agency results from a rule of law*, and not from the assent of the parties.

The doctrine of agency by estoppel has been stated as follows by an eminent judge: "Where one has so acted, as from his conduct to lead another to believe he has appointed some one to act as his agent, and knows that another is about to act on that belief, then, unless he interposes, he will, in general, be estopped from disputing the agency, though in fact no agency really existed." This doctrine will be illustrated when we come to consider the liability of the principal for the unauthorized acts of the agent.

The commonest example of agency by necessity is that which the law confers upon a wife, whose husband improperly fails to supply her with necessaries. *It gives her power to pledge his credit for them, even against his will.* In the language of Chief-Justice Holmes, "it creates a compulsory agency." Some courts held that a similar agency exists in favor of infant children against the father

who improperly neglects to supply them with the necessities of life. Still another example of agency by necessity is afforded, when the chosen agent becomes suddenly sick or disabled, and the principal's property must be cared for, before he can select a new agent. For example: A's driver drops from his seat in a fit. C takes charge of the team until A can be informed of what has happened. During this time C is A's agent by necessity, and if a third party is injured by C's negligence in managing the team, A is liable, as he would have been for his driver's negligence.

**160. Legal capacity of principal and of agent.**—Any person who is legally capable of contracting may appoint an agent. On the other hand, every person whom the law declares absolutely incapable of contracting, is equally incapable of appointing an agent. Thus far there is no difficulty. But what is the rule as to persons, such as infants, whose legal incapacity is not absolute, and whose contracts are not void but voidable?

It must be confessed that there is a serious difference of opinion upon this point. The older doctrine was that an infant could not act through an agent; that his appointment of one was void. This still prevails in England and in not a few of our States. *The modern tendency* of courts, however, especially in this country, *is to hold that an infant's appointment of an agent is not void, but voidable only*; and, therefore, that after he is of age, he may ratify an agent's act as he could his own.

Turning now to the inquiry, Who may be an agent? we find the answer a plain and easy one. *Any person may be an agent who has sufficient natural capacity to do the act which is delegated to him.* Of course, if he does not possess full capacity to contract, he will not be bound by his agreement to serve as agent; but so long as he does serve his acts will bind his principal. This certainly is in accordance with common sense. It is the principal who plans

and directs what shall be done, and who is to be liable for what is so done, while the agent is the mere instrument for the execution of the principal's purpose—the medium through which his will operates.

161. **Master and servant.**—Hitherto we have used “agent” as a generic term—as including every one who acts for and represents another. It is often employed, however, as a specific term—that is, to designate a species or class of representatives. In this sense, it is contrasted with “servant.” When used in this way, *it is limited to persons whose chief duty consists in making contracts between their employers and third parties*; while the “servant,” as distinguished from the “agent,” *is employed not to make contracts, but to do other acts for his master.*

A century and a half ago servant was the broader term of the two. Blackstone uses it as including not only house-servants, apprentices, and laborers, but also stewards, factors, and bailiffs. In his time agents were a species of servants. Now servants are a species of agents. This change in the relative meanings of the two terms has taken place in response to a change in business affairs. Formerly the persons employed to represent others in making contracts were comparatively few. Now they are numerous and important. It is the agent rather than the servant whose acts are of prime importance to the employer and to third persons. Hence the term agency has come to include the relations of master and servant as well as those of principal and agent. It is in this broad, generic sense that agency and agent will be used in this chapter, except when attention is called to the fact that they are employed in their narrower signification.

162. **Classification of agents: general and special agents.**—There are two modes of classifying agents: one according to the scope or extent of their authority, the other according to the nature of their duties.

The first method divides them into general and special agents. The Supreme Court of the United States has defined a *general agent as one who is appointed to do acts of a class, and a special agent as one appointed to do individual acts*. In the case then before the court the agent had been employed to buy cotton in Arkansas. He was to buy from whom he could, not from individuals specified by his employer or principal. Accordingly, the court ruled that he was a general agent. Had he been sent to buy a particular lot of cotton, or to buy a described horse, he would have been a special agent.

This classification is not a very important or helpful one. Still, when we come to deal with the liability of a principal for the acts of an agent which have not been expressly authorized, we shall find the distinction between general and special agents playing quite a prominent part.

**163. Attorney at law and attorney in fact.**—Let us now turn to the other classification of agents—that based upon the nature of their duties—and consider briefly some of the most important of these classes, taking them up in alphabetical order.

Attorney was at first a mere synonym of agent, meaning one put in the place, stead, or “turn” of another; but now it is applied either to a professional lawyer who is authorized to represent another, called his “client,” in some legal proceeding, or to one who has received from his principal a letter or power of attorney.

**164. The authority of an attorney at law is regulated very largely by the rules or usages of courts.**—As soon as he is employed, and without any special directions from his client, he has authority to do all acts in and out of court which are necessary or incidental to the proper conduct of the matter put into his hands. Indeed, so long as the relation of lawyer and client continues, it is the agent, and not the principal, who appears in court, who conducts the

proceedings, and who is recognized by the court officials as the one properly in control and management of the cause.

*An attorney in fact derives his power to act from the letter or power of attorney.* It is important, therefore, that this instrument be drawn up with care. The following is a power of attorney, giving very full and detailed authority to an agent, who is to represent and act for his principal in various business transactions with a bank:

### Know all Men by these Presents:

That I, John Doe, of Utica, County of Oneida and State of New York, have made, constituted and appointed, and by these presents do make, constitute and appoint Richard Roe, of New York City, my true and lawful Attorney for me and in my name, place and stead, in transacting any business directly or indirectly, with the ~~Corn Exchange Bank~~, N. Y., its Officers or Agents, to sign, indorse, draw, accept, make, execute and deliver, all such Notes, Checks, Bills of Exchange, and other Contracts or Instruments in writing, with or without seal, and such Verbal Contracts as he may deem proper, giving and granting unto my said Attorney full power and authority to do and perform all, any, every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said Attorney or his substitute shall lawfully do or cause to be done by virtue hereof; and any such Notes, Checks, Bills of Exchange, Contracts or Instruments, signed, indorsed, drawn, accepted, made, executed or delivered by my said Attorney, and which shall be hereafter received by or come to said Bank, or its said Officers or Agents, shall bind, and are hereby ratified and confirmed by the undersigned.

In ~~Witness~~ Whereof, I have hereunto set my hand and seal the First day of February, in the year one thousand nine hundred and two.

Sealed and delivered in presence of

JAMES SYLVESTER,  
DAVID JENKINS.

JOHN DOE.      { SEAL }

Instead of being signed by witnesses, it may be acknowledged before a notary public, whose certificate would be as follows:

STATE OF NEW YORK, }  
 ONEIDA COUNTY, } ss.

Be it known, that on the first day of February, in the year one thousand nine hundred and two, before me, the undersigned, a Notary Public, personally came John Doe, and acknowledged the above letter of Attorney to be his act and deed.

In Testimony Whereof, I have hereunto set my hand and affixed my seal the day and year aforesaid.

{ NOTARY'S }  
 { SEAL }

RICHARD SMITH,  
*Notary Public in and for Oneida County.*

165. **Auctioneers.**—An auctioneer is one whose business it is to sell property, at public auction, to the highest bidder. Because of the public character of auction sales, and the opportunity they give for dishonest practises, their conduct is often regulated by city ordinances and by State statutes. These usually fix or limit the amount of the auctioneer's fees, and require him to take out a license, as well as to give a bond for the honest conduct of his business.

One of the peculiarities of the auctioneer is that he may be the agent of both parties. In offering the property for sale, in fixing the terms upon which it is to be sold, and in making statements about its quality and condition, he is the agent of the seller. But when the buyer's bid is accepted and the property knocked down to him, the auctioneer becomes his agent to put down his name as purchaser and thus to sign for him a memorandum of the sale, which will make the contract binding under the statute of frauds. *This agency for the buyer, however, is confined to the time and place of the sale.* It is based upon usage (although this usage is, in some States, confirmed by statute) and not upon an express contract.

Another respect in which the auctioneer differs from most agents is his right to sue in his own name for the purchase price of personal property. Ordinarily the principal and not the agent must sue. This right of the auctioneer is due, also, to business usages. Personal property is generally put into his possession. He is responsible to the owner for its safe-keeping. He is also responsible for the collection and payment over to the principal of the price, less his commissions. Hence, it is held, *he has a special interest in the property*—a sort of ownership of it—*which entitles him to sue for the price in his own name.*

166. **Bank cashiers.**—In the bank cashier we have an excellent example of a general agent, in the broadest sense of that term. It is true that in some banking-houses the president shares with the cashier the control of ordinary business, but as a rule *the cashier is the sole executive chief of the bank.* He has charge of the receipts and payments of money, of the purchase and sale of bills of exchange, of loaning and borrowing money, of indorsing and collecting negotiable paper for the bank, and of certifying checks for depositors. He may be authorized to employ tellers, discount clerks, and other subordinates to help him, but in doing any of the acts above enumerated, whether by such subagents or in person, he binds the bank. For example, he certifies a depositor's check as good, when, in fact, the depositor has no money to his credit. *That certification is binding on the bank in favor of any one who takes the certified check for value and without notice of the falsity of the cashier's statement.*

167. **Brokers.**—These cover a very extensive field of business transactions and are divided into many classes. We have bill and note brokers, insurance brokers, merchandise brokers, money brokers, pawnbrokers, real-estate brokers, stock brokers, and ship brokers, each class receiving its name from the particular line of business in which it is engaged.

The distinctive characteristic of a broker is that he *undertakes to bring* the buyer and seller, the lender and the borrower, the insurer and the insured, *to an agreement*. Accordingly, an insurance broker is not to be mistaken for an insurance agent. The latter is an agent of the insurance company, while the business of the former is to negotiate between the insurer and the insured and bring them to an agreement.

Until and unless the broker brings the parties to an agreement, he does not earn any commissions. For unsuccessful efforts he is not entitled to compensation. "*The risk of failure is wholly his. His reward comes only with success.*"

**168. Factor, or commission merchant.**—His business is to receive personal property and sell it for a commission. He differs from a broker, it will be noticed at once, *in having in his possession the property* about which he is to negotiate. Moreover, he often makes advances to the owner of goods sent to him. For any money so advanced, as well as for his commissions, he has a lien on the goods and on the proceeds obtained from this sale. By the usages of trade he has the power to sell in his own name and to sue in his own name for the price, as well as for damages to the goods.

But, at common law, he had *no implied authority to pledge or barter*; his authority was *to sell*. This has been changed in England and in some of our States by statutes called factors' acts. Their provisions, however, are so various and so complicated that we can not attempt to discuss them here.

At times the factor, for an extra commission, guarantees the payment of the price by the buyer. In such a case, of course, if the buyer fails to pay for the goods the factor is bound to pay out of his own pocket. He is then called a *del credere* factor.



**169. Ships' husbands and masters of ships.**—These agents have a very extensive authority. At times one man fills both positions, but, as a rule, the *ship's husband*, or, as he is now generally called, the *managing owner*, is "*the general agent of the owners, in regard to all the affairs of the ship in the home port.*" He it is who arranges for the equipment or repairs of a ship, who hires the officers and crew, and has charge of all contracts for freight and passengers to be carried by her.

*The master of a ship is the one who has command of her.* Ordinarily he is called captain, but an officer of lower rank, such as a mate, may be put in command either by the owners, by the ship's husband, or by the captain, and thus become the ship's master. In the home port his authority is subordinate to that of the ship's husband or managing owner, but during the voyage or in a foreign port his power is supreme to act on behalf of the owners, to pledge their credit, and to make the ship itself liable for money borrowed or supplies furnished when these are *absolutely necessary* to enable him properly to protect the ship and its cargo or to accomplish his voyage.

**170. Termination of agency.**—Having pointed out the ways in which agency may be instituted, and having considered briefly some of the more important classes of agents, let us now inquire how the relation of principal and agent may be terminated.

The general rule upon this point may be stated thus: *Agency may be terminated by the assent of both parties, or by the act of one, or by the operation of law.* To this rule there is an exception, viz., that when the agency is coupled with an interest it can be terminated only by the agent's consent. The exception, however, involves so much of technical law, and is so rarely enforced, that we shall not attempt to explain it here.

It is very clear that the relation of principal and agent

must end when the parties are agreed that it shall end. This agreement may be made in advance, as where the agent is hired for a year. At the end of that time the agency terminates, because the parties have agreed that it shall terminate then. So when the agency is one at will, the parties assent in advance that it may terminate at the will of either party.

It is also clear that either principal or agent has the legal power to end the agency without the other's assent—nay, even against the other's wish and protest. This follows from the fact, already brought out, that *the relation is one of contract*, for a party to a contract has the legal power to break it, though by breaking it he may render himself *liable to pay damages* for the breach to the other party. Of course, if the agency is gratuitous, as where the agent is to receive nothing for his services, either party may end the relation without liability to pay damages, for there is no contract—it is a mere matter of agreement without a consideration.

The law puts an end to agency in several cases. This happens when the *agency becomes illegal*, or its performance *becomes impossible*. An example of the latter case would be an agency for renting a particular building which is afterward destroyed without the owner's fault. Upon *the death* of either principal or agent, the law terminates the agency. This follows necessarily from the fact that agency rests upon a continuing contract between the parties. The death of either withdraws his assent. A like result occurs when either party is *judicially declared insane* or *bankrupt*. The insane person has not a consenting mind, and the control of his property rests in a guardian or trustee appointed by the court. A bankrupt's property passes to his assignee or trustee, and his person becomes, to some extent, subject to the control of the court. At common law, *marriage* terminated any relation of principal and agent which had existed between the parties. The hus-

band and wife were one person, in law, and for most purposes the husband was that person.

171. **Notice of termination.**—Whenever the agency is ended by operation of law, notice of its termination need not be given either to the other party to the relation or to third parties. This is sometimes explained by saying that death, or an adjudication of insanity or of bankruptcy, is a public event, of which the whole world is bound to take notice. Such an explanation seems only an artificial way of saying *that the law*, which puts a stop to the agency, also *relieves the parties from necessity of giving the notice* that must be given in case the agency is terminated by the private acts of the parties.

The reason for requiring notice of the termination of an agency which has been ended by the acts of one or both of the parties is very plain. *If notice were not given, third persons would naturally suppose the agency continued, and would act upon that idea.* To save such persons from being misled to their harm, notice is required. Where the reason for this rule does not exist, the rule itself has no operation. For example, if a person who deals with an agent knows that the agency has been limited to a definite time—say six months or a year—or to a particular act or series of acts, such as the private sale of a horse, or the sale at auction of a lot of goods, he is not entitled to any additional notice of the termination of that agency. But suppose that the person has dealt with a bank cashier, or an insurance agent, or a traveling salesman, whose term of employment he knows nothing about. Naturally he will continue to deal with such agent in reliance on his original authority until he receives notice that the authority has been withdrawn, or, in other words, that the agency has ended.

Accordingly, until notice of termination is given, the principal will be bound by the acts of a former agent, though

he is no longer an agent, in favor of those who are misled by the principal's failure to give notice.

## § 2. PRINCIPAL'S LIABILITY FOR AGENT'S ACTS

172. **His contract liability.**—We come now to consider some very striking peculiarities of this branch of the law. In the first place, when an agent makes a contract, which he is actually authorized to make, between his principal and a third party, he drops out of the transaction entirely. True, it is his mind which has met the mind of the third party in negotiating and closing the agreement. The principal's mind may have been absolutely unconscious of what was taking place between the third party and the agent. Yet, in legal contemplation, it is *his mind which is in agreement* with third party's mind. *The contract and obligation are his*, not those of the agent.

In the second place, *the principal may become a party to a contract whose terms are squarely contrary to his expressed will*. This results from the legal principle that the act of an agent done within the scope of his apparent authority is in law the act of the principal. Let us illustrate. A sends B out to buy wheat, or cotton, or corn, or hops, but instructs him not to pay more than a certain price. Nevertheless, B does buy at a higher price, paying a part and pledging A to pay the balance. A is bound by the contract, unless the seller knew that B was not authorized to make it. The scope of B's apparent authority was to buy at such prices as he should name.

173. **Meaning of scope of apparent authority.**—The *scope* or extent of an agent's *apparent authority* is determined, generally, by *the conduct of the principal* and by *business usages* relating to the particular transaction.

A person permits his coachman to select supplies for his stable, or his butler or cook to order articles for the kitch-

en, and pays the bills. By such conduct he holds these agents out as having authority to agree for him as to the quality and price of articles ordered. After such *holding out*, suppose he tells his coachman to buy a cheaper grade of feed, or a particular style of harness, or tells his cook not to buy any more apples or potatoes while the price is high. Do these orders change the scope of the agent's apparent authority? Clearly not, unless the tradesmen with whom he has been accustomed to deal are notified of them.

By business usages, a factor or commission merchant is authorized to sell at such times and for such prices as he deems best, and in many cases to warrant the quality of the goods. Sales made by him, in accordance with such usages, will bind his principal, although the latter has directed him not to sell at all, or not to sell at the price which he obtained, or not to warrant the goods. *Secret instructions to an agent can not change the scope of his apparent authority.*

**174. The principal's liability in tort.**—Here again the act of the agent or servant, when actually authorized, or when within the scope of his apparent authority, is, so far as the principal or master is concerned, his act. Hence, a party injured by the negligent act of A's omnibus driver is entitled to recover his damages from A. Authorities differ both as to the origin and the reasonableness of this rule, and the subject is too large and perplexing to be discussed at any length here. Perhaps it is enough to say that one of our greatest American judges has declared: "This rule is obviously founded on the great principle of social duty, that *every man in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another*; and if he does not, and another thereby sustains damage, he shall answer it."

It should be borne in mind that the position of the agent or servant who has committed a tort under the ex-

press authority of his principal or master is very different from that of him who has bound his principal by an authorized contract. *He does not drop out of the transaction.* While his wrongful act renders the principal liable for damages, it makes him liable too. It is true that the injured party usually sues the principal, and pays no attention to the agent or servant. But that is only because the principal usually has more money with which to pay damages than the agent. Still, the omnibus driver, the coachman, the street-car driver, or the locomotive engineer, is *personally liable for every injury caused by his negligence*, although his principal is also liable. Nor will the fact that the agent or servant did the wrongful act at the express command of the principal or master enable him to shirk liability. For example, A, without excuse, tells his servant to knock B down, or to shoot B's valuable dog, and the servant obeys, rather than lose his place. *He is liable for the tort.* B may sue either the servant or A, or he may sue both, and may obtain a judgment against each. As, however, he is entitled to be paid but once, it follows that if he collects one judgment he can not collect the other.

**175. Acts done outside the scope of apparent authority.**—It is only for those acts of the servant or agent which are actually or apparently authorized that the principal or master is liable in tort. *For acts done outside the scope of even apparent authority the agent or servant is alone liable.* Such is the rule of law accepted and applied by all courts. It appears to be a very plain and simple rule. And it is. Still, the courts have often differed in applying it to similar sets of facts. Cases of that kind, however, we can not undertake to discuss and criticize here. All that we shall attempt to do is to show the meaning of the general rule by a few examples.

Two cases, decided by the New York Court of Appeals during the same year (1892), illustrate the rule very well.

In the earlier case, a railroad ticket agent ordered the arrest of the plaintiff on the charge of passing counterfeit money when buying railroad tickets. The agent had been warned by a police detective that men answering to a certain description were passing counterfeit five-dollar bills. He thought the plaintiff answered the description and that the bill which plaintiff handed him for the tickets was counterfeit. He took the bill, gave the plaintiff his change and tickets, and ordered the policeman to arrest him. It turned out that the bill was a good one. Plaintiff was discharged from arrest and sued the railroad company for the tort of false imprisonment. He was beaten.

In the latter case a woman was arrested by a ticket seller of the elevated road in New York city, who charged her with passing a counterfeit quarter for her ticket. She insisted that the quarter was good, and refused to give back the ticket or the change. It was good. She sued the railroad company and recovered large damages. How do these cases differ? Why should the principal be liable in the one case and not in the other? Because, said the court, the plaintiff in the earlier case was not acting within the scope of his apparent authority, while in the latter he was. In the former he took the bill, which he believed to be counterfeit, and had the plaintiff arrested in the hope of bringing a criminal to justice. He was not acting in the interest or for the benefit of his principal. He was intent upon rendering a service to the public. In the latter case the agent received the money and gave out the ticket and change before suspecting the quarter to be counterfeit. He then demanded the ticket and change, so as to save his principal from loss. The fact that he blundered and lost his temper and did what he was not actually authorized to do did not relieve the principal. The agent was trying to protect and recover his principal's property, to promote his interests, to carry on his business.

**176. Liability for agent's wilful or malicious acts.**—Not only for unauthorized acts of his agents or servants may the principal or master be responsible, but his liability may extend to *acts done by them for the sole purpose of injuring others*. For example, an engineer blows the whistle in order to frighten plaintiff's horse on a public road, causing it to run away and injure plaintiff and his property; or he runs down and kills plaintiff's cattle when he might have avoided them; or a motorman wilfully runs his car against plaintiff's wagon without any necessity therefor; or a milk-dealer's driver adulterates milk so that he may steal a part of it: the principal is liable. In each case the act done is within the scope of the agent's apparent authority or within the course of the servant's employment. Of course, if the act is outside the scope of apparent authority or the course of employment, the principal or master is not responsible for it. Suppose a street-car conductor leaves his car, chases and injures boys who have been trying to steal a ride. The company will not be liable for the injuries, for the conductor is not acting in the line of his employment.

**177. Principal may be liable to criminal punishment for agent's acts.**—How large is the risk a man runs who chooses or is obliged to have agents or servants is not fully disclosed until we consider his criminal liability for their acts. Some crimes can not be committed without an actual evil intent. Murder and burglary are of this class. In such cases the intent of the agent is not chargeable to the principal simply because of the agency. *The criminal act must have been actually authorized or adopted by the principal.*

But other crimes do not involve the question of intent. Violations of excise or health laws are often of this character. *In such cases the criminal act of the agent is the criminal act of the principal.* For example, a statute absolutely prohibits the sale of liquor during certain hours, either by a licensed dealer or by his employees; or the sale



of oleomargarine in unstamped packages. A bartender or a clerk makes a sale in violation of the statute, but in the course of his employment. It is no defense to a criminal prosecution of the liquor dealer or the grocer that such sale was in violation of his orders. *The act is his act, and he must suffer the penalty.*

**178. Distinction between agent or servant and independent contractor.**—We have seen “that every man in the management of his own affairs, whether by himself or by his agents or servants,” is bound so to “conduct them as not to injure another.” *Does this duty of an employer extend to the acts of an independent contractor, i. e., of one who contracts to do a particular job in accordance with certain specifications, but over whose conduct and methods the employer does not reserve the right of control?*

*The answer is that, as a rule, it does not.* A contracts to repair B’s house, in accordance with the plans and specifications furnished by B’s architect. During the progress of the work C is injured through the negligence of A or of his workmen. B is not liable to C. B is not managing the work, either in person or by his agent or his servant. It is A’s work. He is the manager of the affair and the master of the workmen. Accordingly he is responsible and not B. There are some exceptions to this rule, but the courts are not entirely in accord regarding them, and we shall not enter into their consideration here.

### § 3. PRINCIPAL’S RIGHTS ACQUIRED THROUGH ACTS OF AGENT

**179. In case of a disclosed principal.**—Ordinarily the party with whom the agent deals knows for whom the agent is acting, and it is the intention of all the parties that the transaction shall be one between the principal thus known and the third party. The agent drops out of the transac-

tion, and the principal *acquires all the rights which he would have secured had he conducted the affair in person.* The agent's acts are his acts.

**180. In case of an undisclosed principal.**—At times, however, the agent does not disclose his principal. This often happens when the agent is a factor. In such cases what are the undisclosed principal's rights? Here, again, we are to apply the doctrine that the acts of the agent are the acts of the principal. *The rights acquired are, therefore, the principal's rights.* If a factor sells his principal's goods on credit, as his own, the principal may in his own name sue the buyer for the price. It is true, these rights of the undisclosed principal are subject to some qualifications and exceptions, but the general rule is that stated above.

#### § 4. THE AGENT'S LIABILITY TO THIRD PERSONS

**181. His liability in tort.**—This has been referred to in a previous section, and we need only repeat the rule there laid down, that an agent is liable for his wrongful acts, although they were done at the request or command of his principal.

**182. His contract liability.**—This also has been mentioned, but needs to be explained more fully. We have seen that when he negotiates a contract between his principal and a third person, *keeping within the limits of his authority throughout, and having the contract properly drawn and executed,* he drops out of the transaction and incurs no legal liability. But suppose he fails in either of those two respects; does he thereby make himself liable to the third party? Let us consider the two cases separately.

**183. The agent's liability for unauthorized contracts.**—If he induces the third person to contract with a principal, for whom he knows he has no authority to act, he is guilty of deceit, and *is personally liable for any damages which*

*his wrongdoing may cause the third person.* This is very clear.

If, however, he honestly thinks he has authority, but does not have it, his conduct may be just as harmful to the third person as in the preceding case. Who shall suffer? Surely the one who is at fault, and that one is the unauthorized agent. *He must pay the damages sustained by the third person through his fault.*

**184. The agent's liability upon contracts improperly executed.**—This liability is confined chiefly to contracts under seal, and to negotiable paper, such as bills of exchange and promissory notes. In the case of other written contracts, the form in which they are drawn up and signed is not conclusive against the agent. If all the facts show that he and the third party intended that the contract should bind the principal and not him, the courts will give effect to that intention, although the writing itself would seem to bind the agent.

However, the safe course for the agent in all cases is to have the *written contract made out in the name of the principal, and signed in his name* by the agent. If thus drawn up and executed, the agent will incur no personal liability. On the other hand, if a contract under seal recites that it is made by John Smith, agent for Jesse James, and concludes with these words, "I hereunto set my hand and seal, John Smith, agent for Jesse James," *the agent and not the principal will be bound.* This is due to the technical rule of the common law, that *no one but a party to a deed*—i. e., a contract under seal—is liable to be sued upon it. In the foregoing case John Smith is the maker of the deed, and the seal is his seal.

So a promissory note or a bill of exchange ought to be signed in the name of the principal by the agent—e. g., "Jesse James, by John Smith, agent." This is because of the technical rule of the law merchant, that *persons dealing*

*with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them.* This rule, however, is not enforced quite so strictly as that relating to contracts under seal. If the entire instrument, including the signature, shows that it was intended to be the bill or note of the principal, he will be held and the agent not. Indeed, even when the intention is not clearly shown by the paper, some courts permit other evidence of the intention to be given; and then enforce the contract against either the principal or the agent, according as it is shown to have been intended to bind the one or the other.

## § 5. THE AGENT'S RIGHTS AGAINST THIRD PERSONS

**185. In case of contracts.**—An agent's rights against third persons can be disposed very quickly. Indeed, some of them have been already referred to. We have seen that an auctioneer of personal property or a factor may sue in his own name for the price of goods sold. *So may any agent who has a beneficial interest in the price*—i. e., who has a right to retain a part of the price for his commissions, advances, or expenditures.

Again, an agent who is named as a party to a deed or to a bill or note, may sue upon it. Generally speaking, however, in such an action, the third party may avail himself of any defense which would have been good against the principal, for the suit is brought largely, if not wholly, for the principal's benefit, although in the agent's name.

**186. In case of tort.**—The ways in which third persons may *wrong an agent in his position as agent* (for we are not now considering him in his individual capacity) are not numerous. Perhaps the commonest form of tort against him is that of wrongful interference with the principal's property, which is in his possession and upon which he has some lien or claim. For example, a third person who wrong-

fully takes from an auctioneer or a factor the principal's property, may be sued in tort by the agent.

Another way in which a third person may make himself liable in tort to an agent is by *coercing the principal to dismiss him* through threats of injury to the principal if he does not. Indeed, some courts have held third persons liable in tort *who have peacefully persuaded* the principal to break his contract with the agent.

## § 6. DUTIES OF THE PRINCIPAL AND AGENT TOWARD EACH OTHER

**187. Duties of the principal toward the agent.**—In general terms these may be said to consist in *keeping his contract* with the agent; in *paying him fairly for his services*, when a rate of compensation has not been agreed upon; in *making good his expenditures*; and in *saving him harmless* from all claims against him, because of authorized or ratified acts done by him as agent.

To this last-named duty there are some exceptions. For example, if the agent's acts were known or ought to have been known by him to be illegal, the principal is not legally bound to save him harmless from their consequences. The principal orders his agent to knock a man down, or to destroy his property without lawful excuse, and the agent obeys. If the third party sues the agent and recovers damages from him he can not lawfully call upon the principal for reimbursement. This rule of law was not established out of regard for the dishonest principal, but with a view to discourage law-breaking by agents.

**188. Duties of the agent toward the principal.**—Without irreverence these may be summed up in a commandment, "*Thou shalt love thy principal as thyself.*" An agent who is disloyal, or half-hearted, or covetous, or secretive is in danger of the judgment. He is bound in law, as in

morals, to serve but one master, and to serve him with the utmost good faith. He is bound to give him all the information which he obtains relating to the business intrusted to his care; to obey instructions; to exercise proper skill, and to account fully and honestly for everything that comes into his hands in the agency.

## CHAPTER V

### BAILMENTS, INCLUDING THE OBLIGATIONS OF POSTMASTERS, INNKEEPERS, COMMON CARRIERS, AND TELEGRAPH COMPANIES

#### § 1. NATURE AND CLASSIFICATION OF BAILMENTS

189. **Origin and modification of the term.**—Bailment is derived from the French word *bailler*, meaning to deliver, and was originally applied to the class of business transactions which we are about to consider, because *the basis of obligation* in every case was supposed to be *the delivery of something* by its owner, called the bailor, to another, called the bailee. The term has been modified and broadened, however, so as to include transactions, *where there has not been a delivery by the owner*. A person who finds an article and takes it into his possession is a bailee. So is a sheriff, marshal, or constable who takes property under an execution or other process of a court. So is a postmaster or letter-carrier, although the article, when put into his possession, is not owned by the one who delivers it at the post-office, but the one to whom it is directed.

At present, therefore, the distinguishing characteristic of a bailment does not consist in the fact of a delivery of personal property by the bailor to the bailee, so much as in the fact that *the person having possession of the property is under a duty to hold it for a special purpose, and to surrender it when that purpose is accomplished*.

190. **Bailee's duty may result from agreement or from a rule of law.**—Ordinarily the duty of the bailee, referred to above, is fixed by the terms of his agreement with the bailor. A man borrows a horse, or receives a watch to be cleaned, or undertakes to transport a package as a common carrier; in each case he expressly or impliedly contracts to surrender the property as soon as the special purpose for which he has received it is accomplished.

But what of the finder of goods, or the sheriff who has seized them under an execution, or a postmaster or letter-carrier in possession of mail-matter? In neither case does a contract exist between the bailor and bailee. And yet if the finder disposes of the goods without any effort to discover the owner, or if he refuses to deliver them to him upon demand, he commits the tort of conversion, and renders himself liable to pay the owner for the goods. Indeed, he may commit larceny, and be liable to criminal punishment therefor. So the sheriff is bound to surrender the goods seized by him if the owner tenders the amount of the execution and sheriff's fees. And the postmaster must deliver the mail to the one to whom it is addressed. If he demands more postage than he is entitled to and refuses to deliver until that is paid he may be sued and compelled to pay damages for his misconduct.<sup>1</sup>

In each of these cases the bailee's duty to surrender the property is imposed upon him by the law.

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<sup>1</sup> This was decided by the United States Supreme Court some fifty years ago. The postmaster at Syracuse, N. Y., refused to deliver a newspaper unless letter postage on it was paid. This was claimed because there was an initial upon the wrapper distinct from the direction. Plaintiff refused to pay, and sued the postmaster for conversion before a justice of the peace. He obtained a judgment for 6 cents damages and \$2.98 costs. The postmaster carried the case up through the county court, the State Supreme Court, the State Court of Appeals, to the Supreme Court of the United States, and was beaten in each court. It would be interesting to know how much it cost the



191. **Bailment is confined to personal property, which must be delivered over in specie.**—The Roman law recognized a bailment of land, but our law does not. The relation existing between the owner of real property and one in possession of it is ordinarily that of landlord and tenant, never that of bailor and bailee. Moreover, according to our law, a bailment exists only where *the bailee is bound to redeliver the very thing which is bailed to him*. If A hires a flock of sheep for a year, agreeing to return the same sheep, the transaction is a bailment. If, on the other hand, he takes a flock of sheep agreeing to return at the end of three years the same number of equally good sheep and a certain amount of money, the transaction is a sale and not a bailment. Again, if a man borrows a horse of his neighbor to use for a week, we have a bailment. If he borrows a bag of oats to feed his own horse, and is to return the same amount of like oats, we have a case of barter.

The distinction between bailment on the one hand and barter or sale on the other is very important. If there is a bailment only of the property, and it is destroyed while in the bailee's hands without his fault, the bailor must stand the loss. If, however, there is a sale or a barter, the other party is to bear the loss. Sometimes it is difficult to decide whether a transaction is a bailment or a sale, but the difficulty always comes from the facts being confused—some indicating a bailment and others a sale. The legal test to be applied, however, is perfectly simple and plain, and is this: *Is the very same property to be surrendered by the party in possession which he received*. If it is there is a bailment, otherwise there is not.

It is not to be understood, however, that it is necessary

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parties to settle the rule of law on this point. Probably it cost not much less than a thousand dollars. Should the student care to look up the case, he will find it reported under the title of *Teal vs. Felton*, in 1 Barb. (N. Y.), 512; 1 N. Y., 537; and 12 Howard (U. S.), 284.

that the property is to be delivered up by the bailee in the same form in which it was received. A cabinet-maker who receives a broken chair or table for the purpose of supplying a new leg, or arm, or leaf, is a bailee. So is a miller who receives wheat to be converted into flour, or apples to be made into cider. Of course, if the miller agrees to deliver a certain number of pounds of flour for each bushel of wheat, or a certain quantity of cider for each bushel of apples, and not to deliver the product of the particular wheat or apples brought to him, the transaction is not one of bailment but of barter.

192. **Classification of bailments.**—Perhaps the best classification is that suggested by Judge Story. He divided bailments into three classes, viz.: First, those which are for the sole benefit of the bailor. Second, those for the sole benefit of the bailee. Third, those for the mutual benefit of both parties. This classification is especially convenient, because it corresponds with the degrees of care required of bailees. For example, bailees of the first class need take but slight care of the property, while those of the second class are bound to take extraordinary care, and those of the third class ordinary care, as we shall explain more in detail hereafter.

## § 2. BAILMENTS FOR BAILOR'S EXCLUSIVE BENEFIT

193. **The special purpose of these bailments.**—The earliest form of bailment is still the most frequent form of the class now under consideration. *Its purpose is the safe-keeping of an article without pay.* A person leaves his coat or his book in his friend's room until it is convenient for him to take it away; or he leaves a wagon or mowing-machine in his friend's barn, or a cow in the friend's pasture. In each case, if the owner is to pay nothing for the favor, the bailment is solely for his benefit. Less frequent

forms of this class appear when *one undertakes to carry another's property or to do some work upon it gratuitously.*

As a rule these bailments have the assent of bailor and bailee, but not always. The finder of property who takes it into his possession is, as we have seen, a bailee by operation of law, and the bailment is for the bailor's sole benefit. No compensation for finding or keeping can be lawfully claimed by the bailee. All that he is entitled to is reimbursement of any reasonable expenditure by him in properly caring for the property.

It is to be remembered, however, that *one can not be made a gratuitous bailee without his consent.* The finder of a roll of bills, or of a diamond pin, or a valuable watch may be certain that the property will be destroyed or stolen if he does not take it into his custody. Still, he is under no legal duty to become its bailee. Nor can one be made bailee of property by having it put into his possession without his knowledge. As soon as he discovers it he may rid himself of it, and if it is lost or injured in consequence, the owner has only himself to blame.

**194. Termination of these bailments.**—A bailment of the kind we are now considering may be terminated *by the death or bankruptcy, or by the voluntary act of either party.*

The death or bankruptcy of the bailee operates to end the bailment, because it is founded upon personal confidence in the bailee, and the assignee or executor may be one in whom the bailor has no confidence. Upon the bailor's death or bankruptcy the title to his personal property vests in the assignee or executor or administrator toward whom the bailee may decline to act gratuitously. The bailment may be ended by the voluntary act of either party whenever there is no contract between them; and ordinarily there is no contract in these cases.

**195. Duty of the bailee while the bailment continues.**—While, as a rule, the gratuitous bailee is not bound by con-

tract to take or keep the property, although he may have promised to do so, because there is no consideration for his promise; yet, if he does take it into his possession, he comes under a legal duty to exercise care in accomplishing the purpose for which the bailment was made. The degree of care, as we have remarked already, is less than that required in other classes of bailments. *It is generally described as slight care*—that is, such care as persons of less than common prudence, who may still be called prudent, bestow on their own property of like kind in like circumstances. If the bailee has undertaken not simply to keep the property but to do some work upon it without charge, such as repairing a wagon, or doctoring a horse, or cleaning a watch, or carrying money or goods from one place to another, he is under a legal duty to do that work with at least slight care and skill.

Of course, conduct that would satisfy the requirement of slight care and skill toward property of small value would fall far below that required toward property of great value. It might be no breach of duty for a gratuitous bailee to leave a horse or wagon in an unlocked barn in the country, while it would be in the city. Such a bailee would not be exercising even slight care of a box of jewels if he kept them no more securely than he would a wheelbarrow.

### § 3. BAILMENTS FOR THE BAILEE'S SOLE BENEFIT

196. **The bailee's duty.**—This kind of bailment has its origin always in an agreement of the parties. The first duty of the bailee, therefore, is to do as he has agreed. If he borrows an article for a particular purpose he may use it for that purpose, but for no other. If he secures the loan of it by false statements as to the use he intends to make of it he is guilty of fraud, and is absolutely liable for any harm befalling it while in his possession. Such is also

his liability when he uses it for a purpose materially different from that agreed upon. He becomes substantially an insurer of its safety. For example, A borrowed a yoke of oxen to use in plowing up a hedge, and used them in drawing stones instead. When he returned them one ox was lame. The court declared that he could not escape liability by showing that he used the oxen with the greatest care. When he used them in a way not agreed upon he took the risk of their being harmed.

197. **Must exercise extraordinary care.**—Even when the bailee uses the article in accordance with his agreement, he is bound to exercise more than ordinary care. His duty as generally stated is to exercise the greatest care. Or, to put it in another way, he is liable for slight negligence. But he is not an insurer of safety. If a borrowed animal dies, or is injured, or is stolen, without any fault of the bailee, the loss falls on the lender.

198. **Bailee has no right to lend the property.**—As a rule a person who loans property to another without pay does it because of his confidence in the borrower. Hence the bailee has no right to lend it or give the control of it to a third party. If he does he violates the confidence reposed in him; he breaks the agreement, implied if not expressed, under which he received the property, and is liable for any injury it sustains while the third party has it, without regard to the care or diligence of such party. Of course, this rule does not apply when the lender understands that the thing loaned is not to be used by the bailee personally, but by some one else, such as a member of his family or a servant.

199. **The bailor's duty.**—While the duty of the gratuitous bailee is very stringent, as we have seen, that of the bailor is very slight. Ordinarily he is under no legal duty to permit the bailee to take or to keep the property, although he has so agreed, for his agreement does not amount

to a contract—there is no consideration for his promise. True, it is possible for a gratuitous bailor and bailee to make a contract for the loan of the property, but this is rarely done.<sup>1</sup> As a rule, therefore, the bailor may refuse to let the bailee take the property, even after promising him the use of it, or he may call for it before the time has expired for which it was loaned without incurring any legal liability. It might be unneighborly conduct, but it would not be unlawful.

Again, the bailor is not responsible for defects in the article loaned unless he knew of their existence. The master of a ship loaned a donkey engine to one who was loading freight. Owing to a defect it exploded, and injured the borrower; but, as the master did not know of the defect, it was held that the borrower had no cause of action against him. Had he been aware of the defect, however, it would have been his duty to notify the borrower of it.

#### § 4. BAILMENTS FOR MUTUAL BENEFIT. GENERAL PRINCIPLES

**200. Nature and classification of mutual benefit bailments.**—The name of these bailments fairly indicates their nature, and shows how they differ from those which we have been considering. A person sends a box of silver to a safe-deposit company and pays a dollar a month for storage. The transaction is a mutual-benefit bailment. The bailor finds it to his advantage to have the property stored in a safer place than his house, possibly in a fire-proof and specially policed building; and the bailee receives pay for keeping it.

These bailments have been variously classified, and learned Latin names have been given to the different classes by some authors. We shall not follow the example of these writers, but shall deal with the subject under the following

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<sup>1</sup> See Appendix, p. 272.

titles: Pawn, pledge, or collateral security; postmasters; innkeepers; the hired use of chattels; hired services about chattels, including common carriage of goods; common carriers of passengers; telegraph and telephone companies.

Before taking up these topics for particular consideration it may be well for us to have in mind certain general principles running through all of them, especially those relating to the duties of the bailee and the duties of the bailor.

**201. Duties of the bailee.**—His first and most important duty is to guard the property with ordinary care. On the one hand he is not bound to be as careful as the gratuitous borrower, and on the other he must exercise more care than is required of the bailee who receives no benefit from the transaction. The rule, as generally stated, is this: the mutual-benefit bailee must use such care as an ordinarily prudent person uses toward like property of his own in like circumstances.

It will be noticed that the test is not the care which the bailee takes of his own property of like kind and in like circumstances, but the care taken by the ordinarily prudent person. If the bailee is sued for failure to use such care it is generally a question for the jury whether he has come up to this standard or not.

In case the bailee undertakes to do something to the property for pay—for example, to repair a watch, to make a garment out of cloth furnished, or to carry goods—he is bound to do it with the skill and ability which are exercised by the ordinary, the average person engaged in such work.

Perhaps, as in a previous section, attention should be called to the fact that the bailee's conduct, in order to come up to the proper degree of care or skill, must vary with the character of the property and surrounding circumstances. Conduct which would amount to ordinary care of a lumber

wagon might fall far below such care of an automobile. An express company may need to guard the bag of gold which it is transporting far more closely in one locality than in another; greater caution may be needed at night than in the daytime.

**202. Duties of the bailor.**—These depend very largely upon the contract in each case. When the bailee hires the property, the bailor is bound to let him keep and use it during the time and in the manner agreed upon. If he does not he is liable in damages for breach of his contract. When the bailee is hired to do something to the property it is the bailor's duty to pay for the services. If the amount has been agreed upon he must pay that sum; otherwise, the fair value of the services.

When property is hired for a particular purpose it is the duty of the bailor to supply an article reasonably fit for that purpose. In the case of the donkey engine, referred to above, had the master of the ship received pay for its use he would have been under a duty to furnish an engine fit for the work, and probably would have been liable to the bailee for damages inflicted upon him by the explosion.

## § 5. PAWN, PLEDGE, OR COLLATERAL SECURITY

**203. Nature of this bailment.**—It consists in the delivery of personal property as security for a debt or some other engagement. Pawn is the oldest of the three terms, and is applied, at present, more frequently to petty dealings with licensed pawnbrokers, of whom we shall have a word to say hereafter, than to the larger transactions with banks and bankers, although as a legal term it is synonymous with pledge. Collateral security is sometimes used in a broader sense than the other two terms, and, in that sense, includes a chattel mortgage, which is not a bailment. But it is also used in the narrow sense of pledge. For example,



when a borrower hands to his banker stocks, bonds, or mortgages to secure payment of the debt, the transaction is spoken of indifferently as a pledge of the property, or as giving collateral security.

We have said that a chattel mortgage is not a bailment. They differ in two important respects: First, a bailee does not get title to the goods. He obtains only a special interest in them. A pledgee, for example, has the right to retain the goods until the debt for which they are pledged is paid, but the pledgor is all the time their general owner. While a chattel mortgage passes the title to the mortgagee, although this title is to be passed back to the mortgagor upon payment of the debt. Second, in order to have a valid pledge, the pledgee must obtain possession of the property, while possession by the mortgagee is not essential to the validity of a chattel mortgage, in the absence of some statute changing the common law on this subject.

**204. Possession by the pledgee.**—While the pledgee must have possession of the property, it is not necessary that he take it upon his own premises or keep it in his actual custody. Indeed, after taking possession of it he may leave it with the pledgor, as his agent, and still the pledge be valid. If, however, he gives up possession of it to the pledgor, even for a short time, the bailment is at an end, and the pledgor, if dishonest, may sell or pledge the property to some other person, and thus defeat the first pledgee of all right to or interest in it.

Again, a valid contract for a pledge may be made without giving possession—nay, even before that which is to be pledged has come into existence. Such a contract, however, is not a bailment. That can not arise until the property—farm crops or animals, for instance—have come into existence and also into possession of the pledgee.

**205. Rights of the pledgee.**—In order that the pledgee have any rights the transaction must be legal. If the debt

for which the property is pledged is a gambling debt, a usurious debt, or any other debt which the law of the place where it is made declares to be illegal and void, the pledgee can not hold the property against the pledgor's demand. The pledge of some things, such as the pensions, bounties, and pay of soldiers and sailors, is forbidden by law. A pledgee of such property acquires no interest in it or rights over it as against the pledgor.

When, however, the pledge transaction is a valid one, the pledgee has the right to retain the property until the debt is paid. But he has no right to hold it as security for any other debt or liability. If the debt is not paid at the time agreed upon he may sell the property at public sale after due notice to the pledgor, and apply the proceeds, over and above the expenses of sale, to the debt. Very often the contract between the pledgor and pledgee gives the latter the right to sell at private sale, and without notice to the pledgor. While the pledgee may sell, he is not bound to do so, but may hold the property and sue the debtor. If he pursues the latter course and collects the judgment for the debt, his right to the property ceases, of course.

**206. Duties of the pledgee.**—As pledge is a mutual-benefit bailment—the pledgor being benefited by the loan, made in consideration of the security, and the pledgee being benefited by having the property as security—the pledgee is bound to use ordinary care in guarding the property, but he is not an insurer of its safety. If any profit is derived from the pledge this must be accounted for by the pledgee, and if the pledgor pays his debt the profit or increase of the property belongs to him as the original security does. Even if the pledgor fails to pay, this profit, as well as the original security, must be applied on the debt. This rule is of especial importance when stocks or bonds or animals are pledged. The interest or dividends received from the stocks and bonds, and the offspring of the animals,

form a part of the collateral security, and are to be dealt with as such.

207. **Pawnbrokers.**—Early in this section we referred to the fact that pawn is an older term than pledge or collateral security, and that, while it is legally synonymous with pledge, it is popularly limited to transactions with pawnbrokers. This class of pledges has been the subject of uncomplimentary legislation in England ever since the reign of Elizabeth, and in this country the pawnbroker's business is carefully regulated by State statutes or city ordinances, and in some of our commonwealths by both.

Some of these statutes do not define a pawnbroker, but assume that the distinction between him and a moneybroker or a banker is well known. Others define him as one whose business or occupation is to take by way of pawn, or pledge, or purchase on condition of selling the same back again, any goods, wares, or merchandise as security for the repayment of money lent. He is often spoken of as "the poor man's banker," and many persons who follow this business are high-minded and worthy men. Our statutes and city ordinances proceed upon the theory, however, that the great majority of pawnbrokers, especially in large cities, are ready to take unfair advantage of the needy borrower, and that not a few of them are in league with thieves. Accordingly, pawnbrokers are required to take out a license, to give a bond for the faithful performance of the duties or obligations pertaining to their business, to keep books in which all their transactions are entered, to permit inspection of their books by the proper authorities, to hold the property pawned for a year before selling, and to exhibit stolen goods upon demand to the owner or his authorized agent. The rate of interest which they may lawfully charge is generally fixed, and the manner in which the property shall be brought to sale if it is not redeemed is carefully prescribed.

## § 6. POSTAL BAILMENTS

208. **Their peculiar character.**—It was stated in an earlier section that a postmaster is a bailee of mail-matter in his possession, and is liable as a bailee if he refuses improperly to deliver it. Attention was then called to the fact that this bailment relation did not arise from a contract between the parties. It is true that the sender of mail-matter does enter into a contract with the Government for its transportation. A person wishes to send a letter from New York to San Francisco. He buys a two-cent stamp, puts it on the envelope, and deposits the letter in a post-box or hands it to a letter-carrier. By so doing he has accepted a standing offer of the Government, and thus closed a contract with it for the carriage of the letter to San Francisco, and its delivery to the person to whom it was addressed. If he had made a similar contract with an individual or an express company, such bailee would have been bound to use ordinary care and skill in carrying and delivering the letter, and if it had been lost, stolen, or destroyed because of the bailee's failure to use such care and skill, he would have been liable for it.

The rights of the sender of mail against the Government are quite different. Although he has a valid contract, he can not sue the Government for any breach of it. The letter may be stolen by a postal clerk, or it may be lost through the negligence of some agent of the United States, still, neither the sender nor the one to whom it is sent can maintain a suit against the Government. Nor would the sender or the person to whom the letter was mailed have bettered his position had he registered it. Registration of a letter or a package makes it easier to detect the dishonest or the careless agent, but it makes no difference in the liability of the Government.

This non-liability rule seems a harsh one, especially

when coupled, as it is in this country, with statutes which secure to the Government a monopoly of carrying mail-matter. Under these statutes it is a penal offense for any one to establish an express, or in any manner to provide for the conveyance of letters or packets over any post-route established by law, including the route of a letter-carrier, in a town having the free-delivery system. It is also a penal offense for any one to send mail-matter by such private express or other conveyance. Notwithstanding the harshness of this rule, it is rigidly enforced. The Government, although a bailee of mail-matter for hire, does not permit itself to be sued for the loss, destruction, or theft, even when this results from the gross negligence or even the dishonesty of its agents.

**209. Liability of postal officers.**—Not only is the Government free from legal liability in the cases just mentioned, but so is the Postmaster-General or any other postal official, unless his own act has caused or directly contributed to the loss. Of course, any postal official, no matter what his rank may be, who carelessly loses a letter or wilfully destroys or withholds it without authority of law, is liable in damages to its owner; but the rule of liability of a private principal for the acts of his agents, which we discussed in the chapter on Agency, does not apply to public officers. The reason for this is twofold. In the first place, the officer is not carrying on a business of his own, but the business of the Government. He is not the principal, and hence is not subject to the duty which rests upon the proprietor of a business, to see that it is carefully conducted. In the second place, his subordinates are not his agents, but are officers of the Government precisely as he is. They do not act for and represent him, but the Government.

**210. Summary.**—To sum up, then, postal bailments have some peculiar characteristics. The bailor makes his con-

tract with the Government, but can not maintain an action for its breach, because the State does not allow itself to be sued. Any postal official, having mail-matter in his possession is a bailee thereof, but he is liable only for his own acts and those which he orders or advises. In short, the postal bailee's liability is exceptionally small.

## § 7. INNKEEPERS

211. **Definition.**—An inn, as that term is used in English common law, is a public house of entertainment for travelers. Its public character is often indicated by a sign, but a sign is not necessary to an inn. It is to be distinguished on the one hand from the lodging-house, and on the other from the restaurant or the saloon. The innkeeper undertakes to provide for the traveling public both lodging and food. In this country, tavern and hotel are used interchangeably with inn. Tavern was formerly the ordinary designation, but at present hotel is used more frequently than either of the other terms. In this section we shall use inn rather than tavern or hotel, because it is the term generally used in statutes and in judicial decisions. Perhaps it should be noted that tavern, in England, is not synonymous with inn or hotel, but with restaurant or refreshment room. It is not necessary that a house be kept open for the entertainment of the public throughout the year in order to be an inn, as is seen in the case of a hotel in a summer or a winter resort. On the other hand, a private house does not become an inn by being thrown open to the public for a few days during a festival, a fair week, or other special occasion. Oftentimes a public house is conducted on what is known as the "European plan." It provides lodging for its guests, and gives them the option of taking meals in the hotel or elsewhere. Such a house is an inn.

212. **Whom must the innkeeper receive?**—As he is engaged in a sort of public employment, the common law made it his duty to receive every traveler or sojourner who applied for entertainment and was ready to pay for it, provided the house was not full and the applicant was fit to be received. Such is still the rule. The innkeeper has no right to discriminate between guests, taking some and turning away others, as whim or personal prejudice may dictate. So long as he has accommodations he must take all fit comers, and treat them fairly. He has the right, however, to charge more for some rooms than others, and is not bound to give a guest his pick of rooms, even among those of the same class.

An innkeeper who refuses to receive, or, after receiving, turns out of his house a guest, without legal excuse, is liable for such damages as his act causes the guest, and may be indicted and punished therefor criminally. In some of our States, statutes have been passed making it a misdemeanor for an innkeeper to discriminate against guests on account of race, color, or creed, and subjecting him to heavy penalties for such discriminations.

We have seen that the law does not force an innkeeper to receive unfit persons as guests. Accordingly, he may reject drunken, disorderly, or openly vicious persons; also those coming from infected districts, whose presence would drive away other guests; as well as persons who insist upon bringing their dogs to share with them the corridors and rooms of the hotel. Whether he may lawfully reject or turn away one whose table manners are unpleasant to others seems to depend upon the degree of their vulgarity. A learned English chief justice once ruled that a guest could not be turned away simply because "he was in the habit of reaching across other guests at table, and of taking potatoes and broiled bones with his fingers." This, said the judge, was not such a "degree of want of polish as would,

in point of law, warrant" the innkeeper in excluding the guest from the inn.

**213. Treatment of sick guests.**—An innkeeper is not bound to turn his house into a hospital. If a guest falls sick, "mine host" may insist upon his leaving the inn, especially if the disease is contagious; but this exclusion must be carried out in a reasonable and humane manner. A few years since a Pennsylvania innkeeper turned a sick guest out of his house and left him on the pavement in a pelting storm, from which exposure he died. Such conduct the jury found was indefensible, and rendered the landlord liable to damages for the guest's death.

**214. Innkeeper's liability for personal injuries to guest.**—Something more than three hundred years ago the court of King's Bench in England declared that "if the guest be beaten in the inn the innkeeper shall not answer for it," giving as its reason that "the innkeeper ought to keep the goods of his guest but not his person." Such is not the modern doctrine in this country. Not only is the innkeeper liable for personal injuries inflicted by himself or by his agents and servants within the scope of their employment, but, in some cases, for those inflicted by other guests. Here, again, Pennsylvania furnishes a recent decision in point. Two boys became intoxicated in the defendant's tavern. One of them pinned a piece of paper to the other's coat and set fire to it. As a result the victim of the joke was badly burned. The court held that if the defendant saw what was going on and failed to protect the plaintiff, or if he was guilty of making drunk the boy who pinned and fired the paper, he was liable for the damages sustained by the plaintiff, and this general rule was laid down: "Where one enters a saloon or tavern opened for the entertainment of the public, the proprietor is bound to see that he is properly protected from the assaults or insults, as well of



those who are in his employ as of the drunken and vicious men whom he may choose to harbor."

An innkeeper is also answerable for injuries sustained by his guest because of the unsafe or unsanitary condition of the inn, or because of unwholesome food. If an innkeeper knows that a room has been occupied by a guest sick with smallpox he is bound to have it disinfected. He is also bound to exclude persons whom he knows or has reason to suspect are suffering from contagious diseases. If he is negligent in either of these respects, or in keeping his premises in a reasonably safe condition, or in providing wholesome food and drink, he is liable for damages due to his negligence.

**215. Innkeeper's liability for guest's property.**—This is much more severe than his liability for the guest's person, and is substantially that of an insurer. He is bound to keep the property of a guest safely. It is no defense for him at common law that it has been stolen by burglars, or destroyed by a mob or an incendiary fire. Unless he can show that its loss or injury is due to an act of God, or of the public enemy, or the neglect or fraud of the guest, he must pay for it. At least, such is the common-law rule in England and in most of our States. A few of our courts, however, have favored a less rigorous rule, which exempts the innkeeper from liability upon proof that the loss was not due to any fault on his own part or on that of his agents or servants. The common-law rule originated at a time when innkeepers were frequently in league with thieves and highwaymen—a period which is vividly pictured by Charles Reade in *The Cloister and the Hearth*. While the modern hotel and the highways leading to it are not infested with thieves and robbers, as were those of three or four centuries ago, the great majority of modern judges have enforced the old rule rigorously. Chief-Justice Shaw, of Massachusetts, declared that "it was founded on the expediency of throw-

ing the risk on those who can best guard against it," and Judge Porter, of the New York Court of Appeals, asserted that "its abrogation would be the removal of a safeguard against fraud, in which almost every citizen has an immediate interest."

**216. Statutory modification of innkeeper's liability.—**

The rule has been modified to some extent by legislation both in England and in this country. While statutes on this subject differ in matters of detail, their main purpose is to relieve the innkeeper from his common-law liability for money, jewelry, and the like belonging to the guest, which are not delivered to him for safe-keeping. To bring himself within the protection of these statutes, he must generally provide a safe place for such valuables, and must post notices in the prescribed places and form. In some states the legislature has exempted him from liability for property destroyed by an incendiary fire. As a rule, these statutes have been construed very strictly, and the innkeeper, who has failed to observe their requirements in any respect, has lost the benefit of them altogether. For example, the English statute required the innkeeper to post a plainly printed copy of the first section. That section contained the words "wilful act, default, or neglect." It was held that an innkeeper whose posted copy omitted the word "act," had not complied with the statute, and was not entitled to its benefit, but remained subject to his common-law liability.

**217. The common-law exceptions to liability.—**As was stated in a preceding paragraph, the innkeeper is not liable for the goods of a guest which have been injured or destroyed by the act of God, by the public enemy, or by the fraud or fault of the guest.

The phrase "act of God" is not a very happy one, and has been criticized as irreverent. A distinguished lawyer of a former generation, David Dudley Field, proposed to

substitute for it "irresistible superhuman cause." It has been defined by an English chief justice as follows: "Such a direct and violent and sudden and irresistible act of nature as could not by any amount of ability have been foreseen, or if foreseen, could not by any amount of human care or skill have been prevented." This definition is too narrow. It is not necessary that the act could not possibly have been foreseen or prevented. It is enough that it could not have been foreseen or prevented by the exercise of reasonable diligence, care, and skill on the part of the innkeeper. Sometimes "act of God" has been treated as synonymous with inevitable accident. But they are quite different. A fire, caused by lightning, is due to an act of God, but one resulting from a defective flue, or from the explosion of a steam-boiler, without carelessness on the part of the innkeeper or his agents or servants, is due to inevitable accident. For the former he is not liable, for the latter he is. Other examples of an "act of God" are earthquakes, tornadoes, unprecedented floods, and sudden death due to natural causes.

"The public enemy" is another phrase bearing a technical meaning in the law of bailments. It does not include every one who would be called an enemy of the public in popular speech. Thieves, robbers, or a mob are not within its scope. It applies only to those engaged in war against the Government. It includes pirates, for they are at war with every organized state, and in this country it has been held to include marauding Indians on the frontier, for the Indian tribes are not citizens and are recognized as having a semi-independence.

The third exception noted above—loss due to the guest's fault—is illustrated by the following cases: A guest knew that his horse had the vicious habit of pulling when hitched with a halter. He said nothing about this to the innkeeper or his servants. The horse was hitched in the ordinary way,

and during the night in a fit of pulling killed himself. It was held that the horse's death was due to his owner's fault, in not disclosing the animal's vicious habit, and that the innkeeper was not liable for the death. In another case the guest had more than six thousand dollars' worth of jewelry in a handbag, which he left unlocked in the coat-room without notifying the innkeeper of the contents. The Supreme Court of the United States declared that the loss of the jewelry was to be charged to the negligence of the guest unless he could show that the innkeeper or his servants were actually at fault in guarding the property.

218. **Who is a guest?**—The extraordinary liability of the innkeeper which we have been considering is limited to guests. It becomes necessary, therefore, to know what constitutes a guest. Whether a particular person is a guest at an inn is not a perplexing question ordinarily; and yet, in some cases the courts have found great difficulty in answering it. Of this class was the suit brought by Mrs. Hancock against the proprietor of a New York hotel for four thousand dollars' worth of jewelry stolen from her room. The defense was that plaintiff was a boarder and not a guest. It appeared that plaintiff, with her husband and family, had been living at the hotel for some months when the theft occurred. Before going there her husband, General Hancock, of the United States army, had asked and received from the defendant special terms for the rooms which they occupied, and had told the defendant that they expected to remain in the rooms until the following summer, provided everything was satisfactory and provided he was not sooner ordered away on military duty. Upon this state of facts the majority of the Court of Appeals held that General Hancock and his family were guests, although three of the judges were of the opinion that they were boarders.

This decision has been criticized, but it appears to be

sound. A person is none the less a guest because he engages a room in advance at a fixed price per day or week. If his stay is indefinite, and may be terminated at any time; if he comes to the inn as a temporary sojourner or traveler or wayfarer, and there receives lodging and entertainment, he is a guest. If, on the other hand, he takes up his residence at the inn for a fixed period and at agreed rates, he is a boarder. Accordingly, the proprietor of a hotel may have the relation of innkeeper to the occupants of some of his rooms, and of boarding-house keeper to others. For the property of his guests his liability is practically that of an insurer. For the property of his boarders he is not liable, unless its loss or injury is due to his negligence.

It was formerly thought, in England, that one could not be a guest at an inn located in the town where he lived, for such an one could not be considered a traveler; but that view has been discarded both there and in this country. A townsman, as well as a man from afar, who puts up at an inn, as a temporary sojourner to enjoy its hospitality, is a traveler and a guest.

**219. Rights of the innkeeper.**—Some of these have been referred to, such as his right to turn away unfit persons, and to demand pay or security in advance. In addition to these is the very important right of lien on the property which the guest brings to the inn. Under this right the innkeeper may hold as security for the guest's bill not only such things as are owned by the guest, but things which he has borrowed or even stolen, provided the innkeeper honestly supposed they belonged to the guest when they were brought to the inn. This lien, or right to hold the goods, will be lost if the innkeeper knowingly and willingly or carelessly lets the property go from his premises. It is what is known as a possessory lien—that is, it exists only while the innkeeper has the property in his possession. At common

law it gave to the innkeeper no right to sell the property ; it gave him only the right to hold on to it. Modern statutes, however, in many States authorize him to sell the property and apply the proceeds upon the unpaid bill.

### § 8. THE HIRED USE OF CHATTELS

220. **A common kind of bailment.**—Very few persons go through life without becoming a party to this form of bailment, for it includes every case of letting or of hiring of personal property. One who hires a bicycle for an hour or for any period of time, or who pays for the use of a book, whether taken from a loan library or from an individual ; or who hires a costume for a fancy-dress ball, or a horse and carriage for a drive, is a bailee. Such a bailment is beneficial to both parties—the bailee is benefited by having the use of the property, while the bailor is benefited by the pay which he receives. The general duties of the parties to this kind of bailment were stated in the fourth section of this chapter, and need not be repeated here. Perhaps a few words should be added concerning the liability of a bailee who uses the property for a different purpose from that for which it was hired.

221. **The bailee may be liable for conversion.**—A person hires a horse and carriage to drive from Cazenovia to De Ruyter, a distance of thirteen miles. Instead of making this trip he drives in quite a different direction to Syracuse, which is several miles farther away. This is an act of conversion, and the liveryman may sue the hirer and recover the full value of the horse and carriage. Instead of this he may receive the property from the hirer and sue him for the difference between its value when it was let and when it was returned. The liveryman rarely exercises either of these rights, unless the property has been injured while in possession of the hirer, or unless the contract of bailment can not

be enforced. Examples of such contracts are those made by a minor, or by an adult for Sunday pleasure driving in States where such driving is illegal. If the hirer sets up his infancy or the illegality of the contract as a defense he can defeat the bailor if the suit is brought on the bailment contract. But if the hirer has been guilty of a technical conversion, neither his infancy nor the illegality of the contract under which he got possession of the property, will save him. In such a case the liveryman or other bailor may ignore the contract and sue the bailee for his wrongful act in using the property in a way to which the bailor had not assented. Any such wrongful act amounts to a technical conversion, for the hirer of property may convert it without using it up, or selling it, or destroying it. He may convert it by acting in defiance of the bailor's ownership; and when a person who has hired a horse to drive to one place drives to a different and more distant place, he assumes dominion over it, in defiance of the bailor, as truly as though he had taken the horse from the stable for the drive, without the bailor's consent. In other words, he converts the horse to his own use, and may be sued in tort for its value.

#### § 9. HIRED SERVICES ABOUT CHATTELS, OTHER THAN THE SERVICES OF COMMON CARRIERS

**222. Why this class of bailments is separated from common carriage.**—We have made this separation because the liability of common carriers is much greater than that of other persons who do work upon or about chattels for pay. The bailees, dealt with in this section, are bound to use ordinary care, diligence, and skill in the performance of their bailment contracts, and are not required to use more unless they have specially engaged to use more.

The services to be rendered by these bailees are of various kinds. They may consist in storing and guarding prop-

erty, as in the case of warehousemen, or in receiving and temporarily keeping it upon a wharf or dock, as in the case of wharfingers; or in keeping and feeding animals in pastures or stables; or in receiving goods for sale, as an auctioneer or factor; or in receiving checks, bills of exchange, and other negotiable paper for collection, as a banker; or in receiving goods to be forwarded by a common carrier, as in case of forwarders; or in receiving grain to be ground, or apples to be made into cider; or in receiving a watch or any other article to be cleaned or repaired. Many of the commonest business transactions, it will be observed, are included in this class of bailments.

**223. Warehousemen and warehouse receipts.**—The warehousing of goods has become a very important branch of business, and assumes a great variety of forms. It includes the huge grain-elevators of our railroad centers and shipping ports; the splendid fire-proof buildings and the handsome equipment of safe-deposit companies, as well as the great structures for the cold storage of fruits, meats, and other food-products. Upon his receipt of property for storage the warehouseman issues a document called a warehouse receipt. The following is a sample:

**FARMERS' AND MERCHANTS' ELEVATOR, No. 546**

LITCHFIELD, MINN., Oct. 31, 1895.

Received in store of N. M. Pearson, ten hundred and seventy-seven bushels No. 10 wheat, which amount, and same quality by grade, will be delivered to the owner of this receipt, or his order, as provided by law and the rules of the railroad and warehouse commission of Minnesota, upon surrender thereof and payment of lawful charges. This grain is insured for the benefit of the owner.

A. J. BARRY, *Lessee*.

By statute in many of our States these receipts have been declared to be negotiable. Accordingly the holder of a warehouse receipt may sell the property described in it,



and by indorsing and delivering it, give all his rights in the property to the purchaser, as fully as though he had actually delivered the property itself. For such purposes the receipt is considered the symbol of the property. Statutes have also been passed making it a crime for a warehouseman to sell, dispose of, or deliver any property represented by a warehouse receipt, without the authority of the owner and the return of the receipt.

### § 10. COMMON CARRIERS OF GOODS

**224. Definition and general duty.**—A common carrier of goods is one who holds himself out to the public as ready and willing to transport personal property for hire from one place to another, for all who choose to employ him. It will be observed that a person is not brought within this class of bailees simply by engaging in the transportation of goods. So long as his business is a private one; so long as he undertakes to carry goods only at such times, for such persons, and on such terms as he may choose, he is not a common carrier. The law does not force any one into this class of bailees, and it permits any one to retire from its ranks.

When, however, one voluntarily enters this class, he limits to some extent his liberty of action. He takes upon himself a public occupation, the conduct of which he is not allowed to control entirely. The law steps in and imposes upon him certain obligations. Of these, the first and most general, is the duty of serving the public fairly and honestly. He is bound to receive and carry for all persons without discrimination. If he violates this duty he makes himself liable to pay damages to any one injured thereby. Having held himself out as ready and willing to carry for all, his refusal so to do without sufficient excuse is treated as a sort of fraud upon every one whose goods are refused.

Examples of common carriers are very numerous. They are supplied not only by the great railroad, express, and steamship companies, but by the masters of ships, the owners of stage-coaches, of trucks, and the like, who engage in the public occupation of transporting goods for hire.

**225. Excuses for refusing to carry.**—A common carrier rarely holds himself out as ready to carry any and every kind of goods. Unless he does, he may safely decline to accept such as are of a different character from those which he publicly announced he would carry. For example, a railroad or stage-coach company, although a common carrier of ordinary freight, is not bound to receive and transport money or dogs. Again, the carrier may refuse to take the goods for transportation unless a fair and reasonable payment is made in advance. So he may refuse if his ship, or his cars, or his wagon is full. Nor is he bound to increase his transportation facilities, so as to be able to take everything which is tendered. Still again, he is excused for refusing articles which are improperly packed or prepared for carriage, or which are dangerous to life or property.

**226. Common carrier's liability for goods received.**—Not only did the common law impose upon this class of bailees the obligation to accept and carry all goods delivered to them (save in exceptional cases as above explained), but it bound them "to answer for the goods against all events but the act of God, or the public enemy, or the fault of the bailor." It was no defense to the common carrier that the goods were destroyed by a fire for which neither he nor his servants were responsible, or by a mob, or were taken from him by highway robbers. By receiving them in his capacity of common carrier he became virtually the insurer of their safety. This rule was based upon considerations of public policy. Said Lord Mansfield, in a case where a common carrier was held liable for a quantity of hops, destroyed by a purely accidental fire while in his pos-

session: "To prevent litigation, collusion, and the necessity of going into circumstances impossible to be unraveled, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightning, and tempests. If an armed force come to rob the carrier of the goods he is liable. The true reason for this is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose and share the spoil."

**227. Exceptions to the rule of liability.**—Two of these exceptions—the act of God and the public enemy—were sufficiently explained in the section on Innkeepers. Perhaps a few words should be added about the third exception—the fault of the bailor. This includes cases where the loss or injury is due to some defect in the property, as when perishable fruit is shipped at an improper time or in an improper manner; or an animal hurts or kills itself by reason of some vicious habit; or goods are destroyed by spontaneous combustion or explosion; or liquor is spoiled because of its natural tendency to effervescence or acidity during transportation. It also includes cases where the property is delivered to the wrong person owing to the improper directions of the bailor. Still another class of cases coming within this exception are those where the shipper has concealed the true character of the property for the purpose of getting lower rates. The frequency with which these cases appear in the reports shows that deception of this sort is quite common. Here are a few samples: Money was concealed in a bag of hay in one case, in another in a quantity of tea; a diamond ring was wound with cotton and tied in a paper bag; a quantity of silks, satins, laces, and valuables was packed in a basket tied around with a rope, and shipped as household goods. In all of these cases the carrier was relieved from his common-law liability as insurer, because of the deception practised upon him by the

shipper—a deception which naturally lessened the care and diligence with which he would guard the property.

**228. When the carrier's liability begins.**—As soon as the property is delivered to and accepted by the common carrier for transportation, his extraordinary liability begins. The only difficulty is in determining when it is so delivered. If the carrier is accustomed to send for the property, as is the practise of express companies in cities and large villages, a delivery is made when the property is taken by the authorized agent. It is also made when the property is taken by one accustomed to receive goods at a particular place, such as the office, dock, or station-house of the carrier. But if a package is handed to an express agent on the street, and the agent is authorized to receive such articles only in the office, a delivery to the carrier is not made.

At times the carrier receives goods which he is to store until it suits the convenience of the bailor to have them started on their journey. In such cases he receives and holds them as warehouseman and not as carrier, and his liability is that of an ordinary bailee for hire. If they are burned or stolen, without negligence on his part, the owner and not he must bear the loss. The carrier, however, does not become a warehouseman of goods delivered to him for immediate transportation, by keeping them in his freight-house until it suits his convenience to put them aboard his cars or ships or wagons. A case of that kind was recently decided by the New York Court of Appeals. A quantity of hay was delivered at the freight-house of a railroad company, ready for immediate transportation, but as the company was short of cars it was left there until a car could be obtained, when the shipper was to load it into the car. While thus in the freight-house it was destroyed by a purely accidental fire. The railroad company contended that it was a warehouseman and not a carrier of the hay, and hence not

bound to pay for it. But the court decided against it, saying: "If a common carrier receives goods into his own warehouse for the accommodation of himself and his customers, so that the deposit there is a mere accessory to the carriage, and for the purpose of facilitating it, his liability as a carrier will commence with the receipt of the goods."

**229. Termination of carrier's liability.**—This depends very much upon the usages of the carrier. An express company, especially in cities and large villages, is accustomed to deliver at the residence or place of business named on the package. Until such delivery is made or excused, its carriers' liability continues. Carriers by water or rail, however, have a different usage. As a rule they deliver only at the dock, wharf, or station of the town to which the goods are sent. Upon their arrival the carrier generally sends a postal card or other notice to the consignee, telling him where they are, and the time within which he must take them away. If they are not removed within such period the carrier's liability changes to that of warehouseman. Indeed, in some of our States it is held that he need not give notice of arrival in order to terminate his liability as carrier; that it ends as soon as the goods are removed from the car or the vessel, and that thereafter he holds them as warehouseman.

Property is frequently tendered to a carrier for transportation to some point not on his line. He is not bound, at common law, to receive it; but as a rule he is only too glad to carry it as far as he can, and deliver to a connecting carrier. The liability which he assumes upon receiving it varies with the contract which he makes. If he undertakes to deliver it at its final destination he will be liable as carrier until it reaches that destination. In England and in a few of our States such an undertaking is inferred whenever he receives without objection the goods marked

for a place beyond his own line. The general rule in this country is, however, that such an undertaking is not to be inferred from the mere reception of the goods; and unless the first carrier receives pay for the whole journey, or in his bill of lading or shipping receipt agrees to deliver them at their final destination, his contract is to carry them over his own line and deliver or tender them to the connecting carrier. In other words, he is liable as a carrier while the goods are in course of transportation over his own line, and as a forwarder, while holding them for acceptance by the next carrier.

**230. Modification of carrier's liability by contract.**—We have just seen that a carrier may by contract extend his common-law liability. So by contract he may diminish it.

For example, when goods are tendered to him for transportation he may say to the owner, "I will carry them for a certain price provided you will stipulate to exempt me from my liability as insurer." If the owner assents, and delivers the goods upon those terms, a valid contract is made, and the carrier's liability is reduced from that of insurer to that of an ordinary bailee for hire. Thus far all courts are agreed, although in some States statutes have been passed prohibiting such contracts. But suppose the carrier is not content with this modification of his common-law liability, and insists that the shipper shall stipulate to exempt him from the liability of an ordinary bailee—that is, from liability for negligence on his part or that of his servants—and the shipper does so stipulate. Is the agreement thus made binding, or is it voidable by the shipper?

In England and in New York it is binding. True, the shipper is under no obligation to enter into such an agreement. He has the legal right to say to the carrier, "You must carry my goods under your common-law liability," and if he takes that position the carrier must receive them

or pay damages for violating his legal duty. If he does receive them, however, upon such terms, he may charge for their carriage more than his usual rate, providing his charge is not unreasonable. If, however, the shipper does not take the position just referred to, but clearly assents to the stipulation proposed by the carrier, the English and New York courts hold him to his contract. Even these courts, however, do not permit the carrier to stipulate for exemption from the consequences of his own or his servant's wilful misconduct.

The Supreme Court of the United States and most of our State courts refuse to enforce contracts by which the common carrier is exempted from liability for negligence. They rest this refusal upon two grounds: First, such contracts are against public policy, as they tend to induce carelessness on the part of the carrier. Second, the modern common carrier and the shipper do not stand on a footing of equality. A great railroad, or steamship, or express company is in a position to compel a shipper to accept its terms or not ship at all. When it does take advantage of this position the apparent assent of the shipper is unreal, and the contract should be avoided as one obtained by undue influence.

**231. Reasonable and fair regulations.**—It is agreed by all courts that a common carrier may insist upon his patrons conforming to such fair and reasonable regulations as are conducive to the proper conduct of his business. For example, he may require claims for loss or damage of property to be presented in writing and within a specified period. He may require the shipper to state the nature or the value of the property offered for carriage. He may stipulate that he will not be liable beyond a fixed sum unless extra compensation is paid. Express companies, for example, limit their liability for a package to fifty dollars, unless more than the usual rate is paid. This doctrine has been applied by

the Supreme Court of the United States and by many State courts to contracts between railroad companies and shippers of freight.

A man shipped five horses from Jersey City to St. Louis under a written contract which he signed containing a statement that he admitted the terms and conditions therein set out to be just and reasonable. One of those conditions was that the carrier assumed a liability on the animals to the extent of the agreed valuation of two hundred dollars per horse, and no more. Before the horses reached St. Louis one was killed and the others so injured as to be worthless, in a railway accident caused by the negligence but not by the wilful misconduct of the railroad employees. The company admitted its liability for the agreed valuation. The shipper, however, was not satisfied with this. His horses were racers—one of them worth fifteen thousand dollars, he claimed. But the court decided that the valuation which he put upon them in the contract of shipment was conclusive on him. For, said the court, if he had valued them at fifteen thousand dollars each, or at any other large sum, the carrier would have charged, and would have been entitled to, a higher rate of freight. Having secured a low rate by agreeing to a low valuation, it would be unfair to the carrier for the shipper to avoid the contract after loss had occurred. Some of our State courts, however, have refused to enforce such contracts in cases where the loss is due to the carrier's negligence, holding that they are contrary to sound public policy.

**232. Statutory modifications of carrier's common-law liability.**—Both in England and in this country statutes have been passed relieving the common carrier to some extent from his extraordinary liability as insurer. For example, a provision of the United States Revised Statutes exempts the owner of a vessel from loss or damage to merchandise by fire, unless the fire was due to his fault. But



the statutes differ so widely in details that we can not attempt to give a satisfactory account of them here.

Another class of statutes tend to increase the carrier's liability by compelling him to carry property at lower rates than he would otherwise obtain. Still others prohibit every sort of discrimination among patrons. In the early part of this section we said that the common law required the carrier to receive and carry for all persons without discrimination. Under this rule he was bound to take the goods in the order in which they were offered, and not to charge any one more than a fair rate. But the rule did not prohibit his carrying goods for less than a fair rate, nor his receiving them from favored shippers at a later hour than was customary. Indeed, the carrier found many ways of evading the common-law rule and thus favoring one shipper at the expense of another. To correct these abuses the legislation last referred to was enacted. Some of it went too far and was declared unconstitutional by the courts. That which remains in force is intended to secure impartial treatment for all shippers similarly situated.

**233. Lien of common carriers.**—We have seen that the carrier has a right to demand from the shipper payment in advance. If he does not insist upon such payment, and very often he does not, he has a lien upon the goods—that is, he has a right to hold them as security for his services in carrying and warehousing them. This lien, like the corresponding one of the innkeeper, is lost by the voluntary surrender of the property by the carrier. It is only a possessory lien—that is, a claim upon the goods only while they are in the possession of the carrier. At common law the lien did not give him the right to sell the goods; it simply secured to him the right to hold them until the freight charges were paid. Modern statutes in this country have changed this rule, and have given to the carrier authority to sell goods held under his lien at public auction upon

proper notice, and to apply so much of the proceeds as is necessary to the payment of freight and warehouse charges.

It should be borne in mind that the carrier does not get a lien on property which he receives from a thief, or one who is not the true owner, or in some way legally represents or acts for the owner. On the other hand, he may be forced in such a case to surrender it to the owner, and if he has carried it to a distant point to bring it back again without expense to the owner.

### § 11. COMMON CARRIERS OF PASSENGERS

234. **Duty to receive passengers.**—While a common carrier is not a bailee of the passenger's person, he is bailee of the passenger's baggage, for he receives this under an agreement to transport it for him and deliver it up at the stipulated place and time. It is proper, therefore, to deal with this class of carriers in connection with bailments. Moreover, as they hold themselves out to the public, as ready and willing to carry all persons indifferently, they are subject to a common-law duty similar to that imposed upon common carriers of goods; they must receive and carry, to the extent of their accommodations, and in the order in which they come, all fit persons applying for passage, who are ready and willing to pay their fare and conform to reasonable regulations. For a breach of this duty they are liable to an action for damages by the person thus wronged.

It will be noticed that a carrier is not bound to receive unfit persons, such as notorious criminals, or those afflicted with contagious diseases, or offensively sick, or drunken, or disorderly. Indeed, even after such are in his waiting-rooms or vehicles, he may turn them away, provided he acts in a reasonably humane and considerate manner.

Nor is the carrier bound to receive those who apply not

for passage, not as travelers, but for the purpose of doing business in the carrier's coach, or cars, or ship. His undertaking is to transport passengers, not to turn his vehicle into a market or store on wheels.

Some of the regulations which have been declared reasonable by the courts are the following: That the passenger shall buy a ticket before boarding a train or vessel; that tickets must be used within a specified time; that they must be produced when called for by the carrier's agent, such as a railroad conductor; that coupon tickets shall not be good if the coupons are detached; that a ticket shall not entitle the passenger to break his journey and stop over at an intermediate station.

**235. Care of passengers.**—The carrier does not insure the safety of passengers, as he does that of goods, but he is bound to use the best precautions which are known to be in practical use to secure their safety. His duty in this respect begins as soon as a person is accepted as a passenger, and such relationship may exist before the person has boarded a vehicle. For example, a person hails a street-car. It stops for him. He takes hold of the hand-rail, but before he can enter the car it is started and he is thrown to the ground. His right is that of a passenger. Such, too, is the right of a railroad ticket-holder on a station platform or in a waiting-room. Indeed, the much-laughed-at Irish bull of the excited traveler, from whom his train had run away, "Sure, you have a passenger aboard whom you have left behind," is not far from being good law.

Not only is the carrier bound to exercise a high degree of care in selecting his means of conveyance, but he must be equally careful in inspecting and repairing them. Of course, the skill and diligence necessary to the proper performance of this duty will depend very largely upon the circumstances of each case. One who runs a stage-coach up and down mountains or along deep ravines must have

better coaches, harness, and horses, and more experienced drivers than he whose route is over a sandy plain. So, too, the care and skill required of those in charge of an ocean steamship are very different from those which will satisfy the obligation of a canal boatman. The watchfulness of the carrier must increase with the known risks of his business. If he propels his cars by electricity he must see that this dangerous force does not escape, and if through his negligence it does escape and charge the iron guard-rail of a car, and thereby a passenger is hurt, the carrier is liable.

**236. Accommodations for passengers.**—While a carrier is not bound to receive persons beyond the capacity of his vehicles, yet, if he sells tickets to more than can be seated, those who are left standing may refuse to give up their tickets; and, if required to leave the car or other conveyance, may sue the carrier for breach of his contract. Although his ticket entitles him to ride only in a common car, the passenger may take a seat in a parlor or sleeping car of the train until a seat in a common car is supplied. This rule does not apply to ferry-boats, where the usage of many passengers is to stand instead of taking seats. In such cases the carrier is bound to provide only sufficient seats for those who ordinarily prefer to be seated. Indeed, the rule, even in case of railroad passengers who are to ride a long distance, is “more honored in the breach than the observance,” owing to the good nature of the American public, and the disposition of the average person “to get there” rather than to wait for a less crowded train and sue for damages.

**237. Treatment of passengers.**—The carrier is bound to treat his passengers in a decent and proper manner, so long as they conduct themselves properly. For the acts of his agents and servants toward passengers he is often liable where the ordinary principal would not be. In the chapter

on Agency we saw that the liability of the principal is generally limited to acts of his agents or servants done within the scope of their apparent authority. But a railroad company has been held liable in damages, as for an assault and battery, to a lady who was kissed, without her permission, by a conductor. Of course, such act was not within the scope of his apparent authority. Still, the court held, and such is the prevailing rule in this country, that a common carrier undertakes absolutely to protect his passengers against the misconduct of his servants while engaged in executing the contract of carriage.

The carrier is bound, also, to make every reasonable effort to protect his passengers from violence or insult by strangers or fellow-passengers. If he has notice that a mob will probably attack certain passengers if the train is stopped at a particular place, he must take reasonable precautions against the attack. If one passenger abuses or threatens another the carrier should take proper measures to quiet the assailant or put him off the car. But for the negligence of a fellow passenger the carrier is not ordinarily responsible. In a case decided by the New York Court of Appeals it appeared that the plaintiff was injured by the fall of a clothes-wringer which a fellow passenger had carelessly put in a rack over plaintiff's seat. The court held that the carrier was not bound "to exercise the highest care which human vigilance can give," against the negligence of fellow passengers, but only reasonable care, and as there was no evidence of the lack of such care on the part of the trainmen the plaintiff could not recover against the road.

**238. Limitation of carrier's liability by contract.**—In England and in some of our States the carrier of passengers is allowed to limit his common-law liability by an express contract, even to the extent of exempting himself from damages caused by his negligence or that of his servants. The

Federal courts as well as those of most of our States refuse to enforce such contracts, for the reasons which we recounted in the preceding section, when dealing with similar contracts by carriers of goods.

**239. Carrier's liability for passenger's baggage.**—When a passenger buys his ticket he acquires the right to have his personal baggage carried as well as himself. For such baggage the carrier is liable at common law as an insurer against all loss or damage save that caused by the act of God, or the public enemy, or the fault of the passenger. He may indeed, by a contract fairly made with the passenger, limit his liability to a specific sum, unless the character of the baggage is disclosed and he receives extra pay.

A good deal of litigation has been needed to define the term baggage, and the end is not yet. However, it is generally held to include not only such articles as are absolutely necessary for the passenger, while traveling, but those which minister to his comfort, convenience, and recreation while away from home, or which he is taking to his home. The gun and ammunition, the fishing-tackle and appliances, of those on hunting or fishing excursions; the golf-sticks of one on his way to the links; the beds and bedding of one moving with his family; new clothing for members of one's family, but not presents for his landlady, have been declared by the courts to come within the term baggage. On the other hand the sample trunks of the drummer; ninety-two thousand dollars in gold coin which a county treasurer was carrying to the treasurer of a State; stage costumes, appliances, and advertisements of a theatrical company, have been held not to be personal baggage.

Perhaps one of the largest sums ever recovered for baggage was ten thousand dollars awarded by a jury to the Russian Countess Fraloff against the New York Central Railroad. After traveling in Europe, Asia, and Africa, she came to America. On the trip from New York to Niagara Falls

one of her trunks was broken open and some two hundred yards of dress lace stolen. This she valued at fifty thousand dollars, but the railroad declined to pay her anything, on the ground that the lace was not a proper item of baggage. In sustaining a recovery by the countess for ten thousand dollars, the Supreme Court of the United States laid down this rule: "Whether articles of wearing apparel, in any particular case, constitute baggage, for which the carrier is liable as insurer, depends upon the inquiry whether they are such in quantity and value as passengers under like circumstances ordinarily or usually carry for personal use when traveling." Taking the great wealth and high social position of the plaintiff into account, the court did not think the jury was wrong in holding that this dress lace was a suitable and ordinary item of her baggage.

**240. Fault of the passenger.**—Oftentimes the passenger keeps a part of his baggage under his exclusive control. In such cases the carrier is not liable as insurer, but only for loss or injury due to the negligence or misconduct of himself or his servants. A person who drives his horses on to a ferry-boat and remains in control of them must bear the loss if they are frightened and jump from the boat into the water. So must the passenger whose hand-bag is stolen or lost without negligence on the part of the carrier.

**241. Termination of carrier's liability.**—Not only is the carrier bound to transport the passenger and his baggage to the destination agreed upon, but he is bound to afford a suitable opportunity for alighting. If he owns or controls the premises where the passenger alights, he is bound to keep them in a safe condition. Moreover, he must give a reasonable time and a fair opportunity for the removal of baggage. Usually a passenger has twenty-four hours within which to take his baggage. During such period the carrier remains liable as insurer, but thereafter he is liable as warehouseman only, and may charge a warehouseman's fees.

## § 12. TELEGRAPH AND TELEPHONE COMPANIES

**242. Not common carriers.**—The telegraph and the telephone have not only revolutionized business habits and become necessities of commerce, but have brought before the courts for decision many novel questions. One of the earliest of these related to the legal status of a telegraph company. "Was it a common carrier?" Some courts answered it in the affirmative, and this view still prevails in a few jurisdictions; but the great weight of authority favors a negative answer. Upon principle it seems clear that neither the telegraph nor telephone company is a carrier, or bailee of any kind, of the message transmitted over its wires. It does not receive a chattel or article of personal property which is to be carried and delivered to the bailor or some one named by him. The telegraph company receives a bit of writing and translates and transmits its language through different symbols, by means of electricity, to its agent at a distance. The telephone company furnishes lines and instruments, by the use of which a person can transmit his spoken words to one at a distance. Surely here is no transportation of goods. Moreover, the company has no such peculiar opportunity as that of the common carrier to embezzle property or to collude with thieves. Accordingly, it should not be held to the rigid accountability of the common carrier; it should not be treated as an insurer of the safety of the message. For example, if the message is destroyed by fire, without the company's negligence, either at the office where it is received, at an office where it is to be repeated, or at the office of final destination, the company should not be held liable to the sender, although he may have suffered a great loss thereby. And such is the prevailing view.

**243. Nature of the company's liability.**—While a telegraph or telephone company is not an insurer of safety or accuracy in the transmission of messages, it is bound to use



reasonable care in the construction and maintenance of its lines and instruments and in the selection of its agents and servants. For damages to its patrons caused by its negligence in any such respect it is answerable.

It is also bound to serve all customers alike, without discrimination; and it must receive to the extent of its capacity, all decent and lawful messages which are legibly written and for which reasonable compensation is tendered. It is entitled to reject immoral or libelous messages. Indeed, if it transmits a libel—that is, a writing which tends to bring a person into hatred, contempt, or ridicule—it makes itself liable to an action for publishing the defamatory statement. In one case a telegraph company had to pay a thousand dollars' damages for transmitting this message to a candidate for a political office, "Slippery Sam, your name is pants."

**244. Liability may be limited or enlarged by contract.**—At times telegraph companies agree to insure the accuracy or the specially prompt delivery of messages for extra compensation. Such contracts are always binding. On the other hand, these companies more frequently stipulate for entire exemption from liability, unless the message is repeated—that is, telegraphed back to the originating office for comparison, and an additional charge—usually one-half the regular rate—is paid. Whether such a stipulation is binding on the sender of the message is a question upon which the courts have differed. The United States Supreme Court and the majority of the State courts hold that it is, while the courts of a few States hold it to be void. The latter holding is based on two principal grounds: First, that the company and the sender are not on an equal footing, the former being in a position to force the latter to accept whatever terms it may impose; and, second, that the stipulation is against public policy, because it tends to make the company and its servants careless in the performance of their duties.

Another stipulation, which telegraph companies usually require the sender to agree to, is that it shall not be liable for damages unless the claim is presented in writing within sixty days after the message is filed with the company for transmission. This has been adjudged a reasonable regulation by most courts. It has for its object, these courts declare, not the exemption of the company from the consequences of its negligence, but a fairly prompt notification of claims made against it, so that it may inquire into the circumstances of a mistake, while the matter is fresh in the memory of its agents and servants. It simply requires the sender to act fairly, and tends to protect the company against stale and trumped-up claims. Some courts, however, hold such a stipulation void, because they think it shortens unduly the time for presenting claims.

**245. To whom the company is liable.**—Upon this point, also, the courts are not agreed. Some hold that the liability is limited to the sender of the message, unless the one to whom it is sent is the sender's principal. Other courts hold the company liable to the receiver as well as to the sender. A leading case in Pennsylvania affords a fine example of this view. L delivered to a telegraph company in New York city a message to D, a florist in Philadelphia, ordering two hand bouquets. The New York operator thought "hand" was "hund," and sent the message for "two hundred bouquets." D prepared that number, but L refused to take them, on the ground that he had ordered only two. D sued the company and recovered a hundred dollars' damages. The court said: "If the handwriting was so bad that the operator could not read it correctly he should not have undertaken to send it; but the business of transmission assumed, it was his duty to send what was written. When he presumed to translate the handwriting, and to add letters which confessedly were not in it, he made the company responsible for the damages that resulted from his wrongdoing."

## CHAPTER VI

### BANKRUPTCY AND INSOLVENCY

246. **The severity of early bankruptcy laws.**—No branch of law furnishes a better illustration of the way in which legal rules are modified by the moral sense and the business interests of communities than the one we are now to consider. Primitive law treats the man who can not pay his debts with great harshness. According to some authorities a creditor was permitted by the law of early Rome to put his debtor to death if the debt remained unpaid for a certain length of time, and in case there were several creditors they might cut the debtor's body in pieces and each take a share. This "butcherly" practise, as Blackstone calls it, has been doubted, but there seems to be no question that a man who could not pay his debts with property had to pay it with his person in early Rome—that is, he became the creditor's slave.

While the early common law of England did not turn the debtor over to the creditor as a slave, it did permit his imprisonment, on the theory that he was guilty of a breach of the peace when he failed to pay a judgment which had been given against him. For such a man the common-law judges had no sympathy. As late as 1663 one of them expressed his views of the spirit of the common law toward insolvent debtors in these words: "If a man is taken in execution and lies in prison for debt, neither the plaintiff, at whose suit he is arrested, nor the sheriff, who takes him,

is bound to find him meat, drink, or clothes. He must live on his own or on the charity of others, and if no one will relieve him, let him die in the name of God, says the law, and so say I."

**247. The rigor of early law has been softened.**—Were a judge to express such a sentiment to-day, he would be driven from the bench. Public opinion would not tolerate such brutality and heartlessness in a judicial officer. During the two centuries and a half which have passed since Justice Hyde gave utterance to the cruel doctrine of his day in the language quoted in the last paragraph, the people of England and of this country have come to believe that imprisonment for debt, when there is no fraud or dishonesty on the part of the debtor, is both inhuman and impolitic. It subjects unfortunate men and women to shameful and painful indignities; it throws decent people into association with vile criminals, and it prevents them from earning money for the support of their families and themselves. Accordingly, statutes have been passed forbidding the arrest and imprisonment of honest debtors.

**248. Distinction between insolvency and bankruptcy laws.**—Such statutes as we have just referred to are known as insolvency laws. Their object is to deliver the debtor's person from imprisonment, but not to free him from liability for past debts. On the other hand, bankruptcy statutes are not concerned directly about the debtors' liability to imprisonment, but seek to accomplish other objects, viz., the division of the debtor's property ratably among all his creditors, and his discharge from all indebtedness.

The early bankruptcy statutes in England applied only to persons who were engaged in trade. It was thought that when such men were overwhelmed by business misfortunes, without dishonesty on their part, they ought to be allowed to turn over what property they had to their creditors and obtain a full discharge from their debts. Then they could

start in business again, and possibly be successful. But this chance was denied to all who were not engaged in trade. At present, both in England and in this country, any debtor, whether a trader or not, can take advantage of the bankruptcy laws. Accordingly, the distinction between insolvency and bankruptcy has ceased to be of much importance. In some of our States the statutes which provide for debtors' discharge from debts are called insolvency statutes, while a similar statute of the United States is called a bankruptcy statute. Perhaps it should be noted in this connection that the term insolvency is not always used in the sense of bankruptcy—that is, to signify that a person has been adjudged a bankrupt, and his property has been taken for division among his creditors; but that it often means the financial condition of one who can not pay his debts as they fall due. In this chapter, however, we shall use it as synonymous with bankruptcy.

**249. Bankruptcy legislation in the United States.**—Before the adoption of the Federal Constitution the several States had absolute control of the subject of bankruptcy, but by a clause of the eighth section of Article I of the Constitution, power was given to Congress to “establish uniform laws on the subject of bankruptcies throughout the United States.” This grant of power, however, did not oust the States of their original authority over the subject. They are still at liberty to pass bankruptcy statutes; but such laws become inoperative whenever a law of Congress on the same subject is in force.

Congress has exercised this power very sparingly. Its first bankruptcy statute was that of 1800. That was passed as a temporary measure, and was repealed in 1803. It was copied after the English bankruptcy statute of that time, and was limited to traders. One of the principal objections to it was that it allowed the merchant, the manufacturer, and other traders to get a discharge from all their debts

while farmers and those not in trade could not take advantage of the statute and obtain a discharge from theirs. The next bankruptcy statute passed by Congress was that of 1841. It too proved unsatisfactory and was repealed in 1843. A third statute was passed in 1867 and repealed in 1878. The present law went into effect July 1, 1898.

**250. State bankruptcy laws are now suspended.**—The Federal act of 1898 provided that “proceedings commenced under State insolvency laws before the passage of this act shall not be affected by it.” All other proceedings under such laws are invalid. In other words, the State laws on the subject of insolvency or bankruptcy are now suspended. They are not repealed, it should be remembered, but they have no vitality so long as a Federal statute on the subject is in force. This is due to the fact that the Constitution of the United States and statutes passed in accordance with it are the supreme law of the land. Should this Federal statute be repealed, however, the State laws would at once come into operation, without any new legislation by the States.

**251. The theory of bankruptcy legislation.**—The earliest bankruptcy statutes in England (those passed during the reigns of Henry VIII and Elizabeth) proceeded upon the theory that traders who failed in business were dishonest as a rule, and should be punished. Lord Coke thought that these statutes were rendered necessary by the growth of iniquity among English merchants. He said: “We have fetched the name as well as the wickedness of bankruptcy from foreign nations. We do not find any act of Parliament made against any English bankrupt until the English merchant had rioted in three kinds of costliness, namely, costly buildings, costly diet, and costly apparel, accompanied with neglect of his trade and servants, and thereby consumed his wealth.” But that view, and the harsh statutes which it produced, have long since been discarded.

Modern bankruptcy legislation is based upon the theory that financial ruin comes upon multitudes of honest and capable business men; that when a man is thus overwhelmed his estate ought to be divided ratably among all his creditors; and that it is for the benefit of the public, quite as much as it is for his own good, that he should have a discharge from his debts and thus be able to make a fresh start in business. Bankruptcy has been called commercial death, and a discharge a new commercial birth.<sup>1</sup>

The importance of a national bankruptcy law is shown by the statistics of business failures in the United States. Even in the prosperous year 1901 there were about ten thousand failures, with liabilities of a hundred million dollars; while in the panicky year, 1893, the numbers were 15,242, with liabilities aggregating \$346,779,889.

**252. Who may be declared bankrupt.**—Under the present Federal law any person who owes debts, except a corporation, may be adjudged a bankrupt if he wishes to take advantage of the act. Such a proceeding is one of voluntary bankruptcy. Not every person, however, can be forced into bankruptcy by his creditors. A “wage-earner” can not be, nor “a person engaged chiefly in farming or the tillage of the soil.” Even in the case of a person not belonging to one of these excepted classes, he must owe debts to the amount of one thousand dollars or over; he must have committed an act of bankruptcy, and the aggregate of his property at a fair valuation must be insufficient to pay his debts, or he can not be declared a bankrupt in an involuntary proceeding.

**253. What are acts of bankruptcy?**—These are divided into five classes by the statute, and consist of (1) his hav-

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<sup>1</sup> The speech of Congressman Jenckes, of Rhode Island, in explanation of the bill which became the bankruptcy law of 1867, is very interesting and valuable. It is found in the Congressional Globe for 1863-'64, pp. 263-266.

ing transferred or concealed any of his property with intent to hinder, delay, or defraud his creditors; or (2) transferring any of his property to a creditor for the purpose of giving that one a preference over other creditors; or (3) suffering a creditor to obtain a preference through legal proceedings; or (4) making an assignment of all his property to a trustee for creditors; or (5) admitting in writing his inability to pay his debts and his willingness to be adjudged a bankrupt. The doing of any of the acts thus enumerated subjects the doer to a proceeding by his creditors to force him into bankruptcy.

**254. Courts; referees; trustees.**—Bankruptcy proceedings, whether voluntarily instituted by the debtor, or whether they are begun against his will by creditors, are brought in the United States district court, but many of the judicial duties connected with such proceedings are performed not by the district judge, but by referees, who are appointed by him. The statute provides that there shall be at least one referee in each county where his services are required, so that neither the bankrupt nor the creditors need make long journeys in order to get to court.

As soon as one is adjudged a bankrupt it becomes his duty to make out a list of his creditors and a statement of his property. The creditors may then elect a trustee, and if they fail to elect, the court may appoint one, whose duty it is to take all of the bankrupt's property except such as is exempt from execution, convert it into cash, and divide this ratably among those of his creditors who have made and filed proofs of their claims in the manner provided by the statute. The amount and kind of property which a bankrupt may retain as exempt from execution will depend on the laws of the State where he is living when the bankruptcy proceedings are begun. These laws differ very widely in their provisions. Some States secure to the debtor only a small amount of the most necessary property, while others



exempt for the benefit of himself and family property worth several thousand dollars.

**255. Discharge of a bankrupt.**—A debtor who has been honest in his business relations, who has not defrauded any of his creditors or wilfully injured property, and who has also acted in accordance with the requirements of the statute, after his adjudication as a bankrupt, may obtain a discharge from all his debts except taxes. Following is the form of an order discharging a bankrupt:

DISTRICT COURT OF THE UNITED STATES,  
NORTHERN DISTRICT OF NEW YORK.

Whereas, John Smith of Utica, in said district, has been duly adjudged a bankrupt, under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in their behalf, it is therefore ordered by this court that said John Smith be discharged from all debts and claims which are provable by said acts against his estate, and which existed on the first day of February, A. D. 1901, on which day the petition for adjudication was filed against him; excepting such debts as are by law exempted from the operation of a discharge in bankruptcy.

Witness the Honorable Alfred C. Coxe, Judge of said District Court, and the seal thereof, this first day of August, A. D. 1901.

CHARLES B. GERMAIN, *Clerk*.

If the bankrupt is sued thereafter on any debt from which this order discharges him he may plead his discharge as a defense, and thus defeat the action.

## CHAPTER VII

### INSURANCE

256. **Its nature and origin.**—The system of insurance has for its object the accumulation of a fund out of which persons who suffer from some accident or mishap may have their losses made good. This fund is accumulated from premiums paid by those who are exposed to some risk, such as the owners of vessels or cargoes which may be shipwrecked, or the owners of buildings or goods which may be destroyed by fire. The amount of the premium in fire and marine insurance, varies with the degree of hazard to which the property is supposed to be subjected. Thus, the fire-insurance premium is smaller in places where there are excellent facilities for putting out fires than in places where such facilities are poor. The owner of a stone or brick building pays less insurance than he whose buildings are of wood, and still less is paid by the owner of a fire-proof structure. Oftentimes the last-named owner has such confidence in the unburnable quality of his building that he leaves it uninsured.

In life-insurance the premium is generally fixed according to the age of the insured. Mortuary tables have been worked out from carefully collected statistics of deaths in various communities, and upon the basis of these tables the annual sum which the insured is to pay is arrived at. One of the oldest of these tables is the Northampton, “which was constructed by Dr. Thomas Price from the

registers kept in the parish of All Saints, Northampton, England, for the years 1735 to 1780 inclusive." The tables which are now considered most trustworthy are the American Experience Table and the Actuaries or Combined Experience Table.

**257. Origin of insurance.**—The practise of insuring property appears to have originated with the merchants of northern Italy, who, under the name of Lombards, controlled much of the commerce of Europe during the middle ages. It was introduced by them into England, and the insurance policy of Lombard Street, London, became the standard form, not only for Great Britain, but for Holland and other foreign countries. The term policy is derived from the Italian *polizza*, meaning a note, bill, or ticket, and indicates that this document originated in Italy. Questions relating to insurance were disposed of by merchants' courts in many of the maritime cities of Europe; but as these courts were becoming obsolete, when the practise of insuring property was introduced into England, it appears to have been customary for parties there to agree that all insurance disputes should be referred to "certain grave and discreet merchants appointed by the Lord Mayor of London, by reason of their experience fittest to understand and speedily to decide such causes." This voluntary, unofficial tribunal was superseded in 1601 by a special court, created by a statute, to consist of the judge of the Admiralty Court, the recorder of London, two doctors of the civil law, two common lawyers, and eight merchants, any five of whom were empowered to hear and determine all causes on policies of assurance arising in London. This statutory court was in turn overthrown by the courts of common law which insisted upon having all insurance litigation brought before them for trial.

**258. Insurance law based upon mercantile usage.**—It was natural that disputes brought before the courts of mer-

chants on the Continent, and the special court of London, should be disposed of in accordance with the usages of merchants. Even after the common-law courts gained full control of such litigation they were careful to give effect to those usages, and the result is that many of the most important principles of insurance law have their origin in the customs of merchants of four hundred years ago. Three of these principles (which we shall explain hereafter) are the following: That the contract of insurance is one of indemnity; that it requires the utmost good faith on the part of the insured, who is bound to make a full disclosure of all material facts affecting the risk; that if a part of a ship or cargo is sacrificed to secure the safety of the rest, that which is saved as the result shall contribute toward the loss sustained by the owner of what was sacrificed.

259. **The earliest form of insurance.**—As might be inferred from what we have already said, the earliest form of insurance was that upon ships and their cargoes, now called marine insurance. In the latter part of the seventeenth century the headquarters for this business in London was a coffee-house, kept by one Lloyd. It was frequented by those engaged in maritime business, and its proprietor was enterprising enough to gather and publish the latest shipping news. In this way he gave his name to the association of underwriters organized at his house and to the standard policy of marine insurance for Great Britain. At present Lloyd's is a corporation, whose objects are stated as follows in the statute which incorporated the society: "The carrying on of the business of marine insurance by its members, the protection of the interests of members; the collection, publication, and diffusion of intelligence and information with respect to shipping." Its collection of shipping news is so extensive and complete as to make its rooms the official center of such information for the whole world. In this country the marine insurance company which is nearest in

importance to British Lloyd's is the Atlantic Mutual of New York.

**260. Fire and life insurance.**—There appears to have been no systematic insurance against fire in England until after the great London fire of 1666; but once the practise was established it spread rapidly, and as early as 1752 a fire-insurance company was organized in this country with Benjamin Franklin as one of its directors. In 1901 there were 510 fire-insurance companies in the United States, with a capital of \$73,150,875 and total assets of \$413,027,067. They received during the preceding year \$182,130,774 in premiums, and paid for losses \$108,357,171.

Life-insurance began in England in 1706, and in this country in 1769, but did not attain much importance until near the middle of the last century. Its development in the United States has been quite phenomenal. In 1901 the amount of such insurance in force here was \$12,836,461,872, while in Great Britain it was \$3,866,000,750, in Germany \$1,320,163,685, and in France only \$695,231,550. The great bulk of the business in this country is done by about 200 companies having assets of about \$2,000,000,000. They received about \$380,000,000 in premiums during 1901, and paid to policy-holders about \$210,000,000. The number of policies in force was somewhat in excess of 17,000,000.

**261. Other forms of insurance.**—During the last century many other forms of insurance have sprung into being. Companies now insure against accident to one's person; against the dishonesty or carelessness of one's employees; against the defects in one's title to property; against burglary and housebreaking; against hailstorms, tornadoes, and other outbursts of natural forces; against boiler explosions; against the death of animals by accident and disease; against bad debts and so on.

**262. Insurance is a contract, and generally in writing.**—When one party insures another, the first promises to

pay money in case a certain event happens—such as death, or loss by perils of the sea, or by fire, or by accident—in consideration of the other's paying or promising to pay a sum called the premium. Here is an offer by the insurer and an acceptance by the insured. Accordingly we have a valid contract, unless it is in the nature of a mere bet or wager, and on that account illegal. It is a wager whenever the insured has no interest in the property, the life, or the transaction which is the subject of insurance. In such a case it is evident that the party insured would be under a constant and strong temptation to destroy the property or the life, for upon such destruction he would receive the insurance money without suffering any loss. When the insured has an interest in the transaction, a valid contract of insurance, as we have said, is made as soon as the insurer's offer is accepted by the insured. A policy or written agreement is not necessary, although it is usually employed. Consequently, if death or loss of property occurs after the acceptance of the offer, and before the policy is written, the insurer will be bound to perform his contract.

**263. Representations and non-disclosure by the insured.**

—In the chapter on contracts we called attention to the fact that innocent misrepresentation or non-disclosure by the promisee in a contract did not, as a rule, give the promiser any right to avoid it or to claim damages. Insurance contracts furnish an exception to this rule. Any misrepresentation or concealment of a material fact—that is, of any fact not known to the insurer, and which would be liable to affect his decision in taking the risk—will avoid the policy, however innocent such misrepresentation or concealment may have been. Thus, when a party applied for insurance on a ship and cargo at and from Genoa to Dublin, he was held to have represented that the ship would load in Genoa, and as she loaded at Leghorn the misrepresentation, though innocently made, rendered the policy void.

The reason for this stringent rule is that the insured usually knows so much more than the insurer about the property or life which is insured, that the parties can not be said to stand upon equal footing when negotiating the contract. Moreover, as we pointed out on a former page, this duty resting on persons applying for insurance to make a full disclosure of all material facts, originated in the usage of merchants. It is not strange, therefore, that it differs from the duty imposed by the common law on contracting parties.

**264. Foregoing doctrine modified in life and fire insurance.**—It has long been the custom of life and fire insurance companies to require the insured to answer a great variety of questions, or to expressly assent to a great many statements, as a condition of obtaining insurance. Hence the courts, in this country, have generally modified the doctrine as to concealment or non-disclosure, stated in the preceding paragraph. Their view is that the insured has a right to suppose that every fact which the insurer thought would be material to the risk, was covered by the prescribed questions or stipulations, and that he is under no legal duty to volunteer further information to the insurer.

**265. Warranties in insurance.**—The term warranty, in insurance law, signifies a statement of fact or a promise to do something, the falsity or non-performance of which avoids the contract. It differs in character from a representation, in that it is always a part of the insurance policy, while a representation is generally made during the negotiations for insurance and not usually embodied in the policy. They differ in their consequences, in that a breach of warranty avoids the policy whether it is material or immaterial, while, as we have seen, the falsity of a representation will not invalidate the policy unless it relates to a material fact. An example of a warranty is a statement in a fire policy that the insured building is one hundred feet

from any other structure. If, in fact, it is only seventy-five feet, the policy may be avoided by the insurer, although this difference in distance did not increase the risk, nor in any way contribute to the destruction of the insured building.

**226. Waiver and estoppel.**—The right to avoid a contract of insurance because of misrepresentation or breach of warranty, may be lost either by waiver or estoppel. These terms were explained in the chapter on Contracts, and we shall not need to spend much time upon them in this connection. A good example of waiver is the following: A fire policy provides that it shall be void if the building remains unoccupied more than ten days without written consent. After this warranty has been broken the insurer tells the insured that he will not take advantage of the breach, and receives a premium on the policy as a valid and subsisting contract. This is a waiver of his right to avoid the policy, and he is liable thereon precisely as though no breach had occurred.

An example of estoppel is afforded by the following case decided by the New York Court of Appeals: The policy contained the clause that it should be void if the insured building was on leased ground. The company knew it was on leased ground when it received the premium and issued the policy. It was held, therefore, that the company having taken the plaintiff's money and given a policy as a valid and binding contract, and thus led him to believe that the property was effectively insured, was estopped, after the property had been burned, from denying the validity of the contract, notwithstanding this statement of fact in the policy, that the building was not on leased ground, was untrue.

**267. Insurance as a contract of indemnity.**—While every form of insurance has an element of speculation or wagering, it is taken out of the category of gambling transactions by the principle which has come down from the custom of



merchants, that its object is indemnity and not profit. Hence, the insured must have an appreciable pecuniary interest in the subject of the insurance. In marine and fire insurance he must be the owner of the property covered by the policy, or of some legal or equitable interest therein, such as that of mortgagee, bailee, tenant, or the like. In life-insurance the insured must be the person on whose life the policy is taken out, or some one having a pecuniary interest in the continuance of that life. A wife has an insurable interest in the life of her husband, and the husband in that of the wife; a parent in the life of a child, and a child in the parent's life; a partner has an insurable interest in the life of his copartner, and a creditor in that of his debtor.

**268. Insurer's rights under principle of indemnity.—**

This principle of indemnity produces some results in marine and fire insurance which are not contemplated by the insured when he takes out his policy. For example, he insures a building for twenty thousand dollars and pays the premium on that sum for years. The building is destroyed by fire. He calls for the sum named in the policy, but the company refuses to pay it, because the building was worth only ten thousand dollars. As the contract is one of indemnity—that is, as its object is to save the insured from loss, not to enable him to make a profit out of the transaction—the company wins, and the insured gets only ten thousand dollars. Of course, this result may be prevented, as it often is, by an express agreement in the policy that the value named therein shall be taken to be its true value. Such a policy is called a “valued policy,” while an ordinary one is an “open policy.” In some States it is declared by statute that the sum named in a fire policy on buildings shall be declared the true value of the insured property.

Another right accruing to the insurer from this principle of indemnity is that of subrogation. Let us illustrate.

Through the negligence of a warehouseman or of a common carrier, A's goods are destroyed by fire. They are insured for their full value. Upon the payment of this amount to A the insurer is entitled to be subrogated to A's claim against the carrier or the warehouseman—that is, to be substituted for A, to be put in his place, with the right to recover whatever A could have recovered. This doctrine, it is thought, throws the loss ultimately upon the wrongdoer, and at the same time prevents the insured from getting twice the value of his property, once from the insurer and once from the wrongdoer.

**269. The principle of indemnity and life-insurance.—**

While the beneficiary in a life-insurance policy—that is, the one to whom the insurance is payable—must have a pecuniary interest in the life on which the policy is taken out, the principle of indemnity does not extend beyond this in life-insurance. Upon the death of a husband, whose life was insured for the benefit of his wife, the latter is entitled to the whole sum named in the policy, and the company can not cut this down by showing, as in the case of a fire policy, that the life was not worth the sum specified.

“Insurers, in such a policy,” to quote from a decision of the Supreme Court of the United States, “contract to pay a certain sum in the event therein specified in consideration of the payment of the stipulated premium or premiums, and it is enough to entitle the assured to recover if it appears that the stipulated event has happened.” Moreover, the premium varies with the age of the insured, and is fixed at a rate determined by the average life of healthy persons, and by the certainty that the death, or other event, upon which the sum becomes payable by the insurer, must happen; while in fire and marine insurance the event insured against may never happen, and this uncertainty is taken into account in fixing the premium.

**270. Various forms of life-insurance.**—The simplest form of contract is that by which the insurer promises to pay a certain sum of money upon the death of a designated person in consideration of the receipt of an annual premium. The sum may be payable to the person whose life is insured, in which case it belongs to his estate, and is collected by his executor or administrator. Or it may be payable to his wife, children, or creditors. At present, life-insurance policies are issued in a variety of forms. They often provide for the payment of a fixed sum when the insured reaches a certain age, or for the payment to him of a fixed sum each year after a certain period. Under these and other plans, life-insurance becomes not only a security to the family or creditors of the insured, but a form of investment. There are also many mutual-benefit associations, whose members insure each other. Upon the death of any one, a certain sum is payable to his estate or to some one named by him, and this sum is made up by assessments on the surviving members.

**271. Accident-insurance.**—Although this form of insurance has been known for more than three hundred years, it did not come into prominence until the latter part of the nineteenth century. The first successful venture in this country was made by The Travelers' Insurance Company, in 1863. A number of serious railroad accidents during the following two or three years gave the movement a great impetus, and at present about seventy companies are engaged in this line of insurance, carrying risks of more than three billion dollars, and paying out in benefits to policy-holders more than five million dollars annually.

**272. Objects and form of policy.**—This kind of insurance has for its object the protection of the insured from the consequences of accidental injuries to his person. By the form of policy commonly used the insurer binds himself to pay a fixed sum (a thousand dollars or some multiple

thereof) for the accidental death of a specified person, or for such extraordinary injuries as the loss of a hand and foot, or both hands or both feet, or total loss of sight; and smaller sums (from five hundred to fifty dollars) for specified injuries of a less severe nature, as well as a weekly sum during the time the injured person is disabled. This period is ordinarily limited to twenty-five weeks, and oftentimes the policy provides that the weekly indemnity shall not exceed the weekly earnings of the insured. Such limitations are imposed as a protection against fraudulent claims.

**273. The cost of accident-insurance.**—This is not large for persons in non-hazardous occupations, varying from four to five dollars for each thousand dollars payable upon death or extraordinary injury, and for a weekly indemnity of five dollars in case of total disability, or of two dollars in case of partial disability. Those who are engaged in occupations of a hazardous character, such as railroad employees or workmen in certain lines of manufacturing, are charged a larger rate. These rates or premiums are based upon tables of statistics of accidents, similar to the mortuary tables used in fixing life-insurance premiums. According to these statistics, one person in every fifteen of ordinary professional and business men meets with some bodily injury each year.

**274. Notice to the insurer.**—It is the duty of the person entitled to payment under an insurance policy of any kind to give notice to the insurer of the event insured against, whether that event be death, loss of property, or accidental injury. In the absence of an agreement on this point the notice may be either oral or written, and may be made at any time before the claim has outlived. As a rule, however, insurance policies contain express stipulations that notice shall be given in writing within a specified period, and that certain proofs, or sworn statements, of the loss of property, or of the death of a person, or of an accident

to him shall be presented to the insurer. Such stipulations must be carefully complied with, or the insurer may be discharged from all liability.

275. **Agents of insurer.**—As a rule, a person engaged in soliciting insurance for a company is its agent, and his acts done within the scope of his apparent authority bind it. The insured ought not to place too much confidence, however, in the appearances of authority of such agents, nor in their statements on that subject. He ought to examine all papers which he is called upon to sign, or which he receives, very carefully, and ought to pay especial attention to all statements in them concerning the authority of agents. Occasionally these papers declare that the agent shall not be deemed to be acting for the company, but shall act for the insured, in taking the application for the policy and forwarding it to the company. Such provisions are declared void by statute in some of our States, and the tendency of judicial decisions, both here and in Britain, is to treat them as not binding on the insured. Still, they are apt to give him no little trouble in case the agent has been dishonest in making out the application and the company refuses to pay. It is well for him, therefore, to decline insurance in a company which tenders him such papers.

## CHAPTER VIII

### NEGOTIABLE PAPER

#### § 1. ITS ORIGIN AND OBJECTS

**276. Negotiable paper originated in the usage of merchants.**—The earliest form of negotiable paper known to English law is the foreign bill of exchange, which appears to have been introduced into England by Italian merchants during the thirteenth century. It was used only in dealings between merchants of different countries. Here is a specimen taken from an English law-book printed in 1655:

Laus Deo, in London this 17th November, 1654, for £100.

At usance<sup>1</sup> pay this my first bill of exchange to Mr. Cornelius Vande B., or order, One Hundred pounds sterling at 36s. 8d. Flemish per pound sterling for value here received of Mr. John C. make good payment, and put it to account, as per advice.

Your loving Friend

To Mr. PETER E.

THOMAS D.

Merchant

in

Amsterdam.

If any dispute had arisen between the parties to such a bill while merchants' courts were in existence in England,

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<sup>1</sup> "Usance," in a London bill on Amsterdam, meant one month at that time. The reader will observe that the rate of exchange is fixed in the foregoing bill, and the holder was entitled to receive in Amsterdam one hundred times thirty-six shillings and eight pence of Flemish money.

it would have been disposed of in one of those courts—in a court staple or a court pepoudrous—which we described in the second chapter. With the opening of the seventeenth century, controversies growing out of negotiable paper found their way into the common-law courts. The earliest reported case of this kind was decided in 1603. Of course, the merchants' courts decided all questions brought before them in accordance with the customs of merchants, and for a time the common-law courts appear to have dealt with these questions in much the same way. Not only that, but those courts followed for a time the merchants' courts in holding that only merchants could be parties to a bill of exchange. In this way the usages of merchants were gradually turned into rules of law.

**277. Why foreign bills of exchange were used.**—If we examine the bill set out in the preceding paragraph we will observe that four parties are concerned. "Mr. John C.," residing in London, wishes to pay one hundred pounds to "Cornelius Vande B." in Amsterdam. To save himself the necessity of carrying this money from London to Amsterdam he pays it in London to "Thomas D.," who has a correspondent in Amsterdam, "Mr. Peter E." For the money thus paid in London, "Thomas D." draws his bill of exchange (and is therefore called the drawer) on "Mr. Peter E." in Amsterdam (who is called the drawee), directing him to pay there to "Cornelius Vande B." (who is called the payee) an equal amount of money. As soon as this order is complied with "John C.'s" payment of one hundred pounds to "Cornelius Vande B." is made, without any money having been carried by the former to the latter. In other words, a debt due from "John C." to "Cornelius Vande B." is exchanged for a debt due from "Peter E." to "Thomas D." Hence the term "bill of exchange," an instrument by which a debt in one place is exchanged for a debt in another,

**278. Inland bills of exchange.**—About the middle of the seventeenth century bills of exchange came into use between merchants in different parts of England. Their validity was questioned by persons who thought that a bill of exchange could be lawfully used only between merchants of different countries, but the courts adopted the usage of domestic merchants upon this point, as formerly they had adopted the usage of foreign merchants. An inland bill did not differ originally in form from a foreign (or in the language of early writers “outland”) bill. It was drawn in sets of two or three, so that if the first bill was lost or accidentally destroyed, one of the others might reach its destination and be paid. If the reader will look at the form set out in the first paragraph of this chapter he will notice that it is the first bill of the set. The second bill would be the same, except that in lieu of the words “pay this my first,” it would have these words, “not having my first, pay this my second.” And the third bill would have the words, “not having my first or second, pay this my third.” At present inland or domestic bills are rarely drawn in sets. A single instrument only is issued, and this rarely names the person by whom the money has been paid to the drawer of the bill.

In this country, an inland bill is one which purports on its face to be drawn and payable within the same State or Territory. Any other bill is a foreign one, whether drawn in one State and payable in another, or whether payable in a foreign country. Accordingly, a bill drawn in Philadelphia on Pittsburg, Pa., is an inland bill. One drawn in New York on Boston, Chicago, Cleveland, St. Louis, or St. Paul, is a foreign bill.

**279. Promissory notes.**—These were the third form of negotiable paper to gain currency in England. They came into use during the close of the seventeenth century, but Chief-Justice Holt refused to give effect to the usage of



merchants relating to them. Thereupon Parliament stepped in and enacted that such notes should be negotiable like bills of exchange; doing this, it declared, with "the intent to encourage trade and commerce." A promissory note payable at a bank is in this form:

\$500.00.

NEW YORK, February 1, 1902.

Three months after date, I promise to pay to the order of James Smith, Five Hundred Dollars, at The Corn Exchange Bank, University Branch, with interest. Value received.

JOHN JONES.

280. **Later forms of negotiable paper.**—No sooner had promissory notes been declared negotiable by Parliament than goldsmiths and other bankers in London began to issue what are now known as bank-notes—that is, written promises to pay certain sums of money to the bearer of the paper on demand. Next came checks, which are simply a species of bill of exchange. As now defined by statute in this country, "a check is a bill of exchange drawn on a bank and payable on demand." Following is a sample:

2902 BROADWAY.	No. 246.	NEW YORK, March 1, 1902.
	<b>THE CORN EXCHANGE BANK</b>	
	UNIVERSITY BRANCH	
	Pay to <u>Teachers College</u> or order	
	<u>One Hundred</u> Dollars	
	\$100.00.	WILLIAM BLACKSTONE.

During the last century, various other forms of contract were devised by the mercantile community for use, similar to that made of bills of exchange, promissory notes, and checks—that is, as securities for money. In most cases the courts—both in England and in this country, have adopted and given effect to such mercantile usages, and have held

the various forms of contract, thus devised and used, to be negotiable paper.

Here, again, we find rules of law, which had their origin in the usages of business men. As these usages were not contrary to any principles of positive law, and tended to the convenience and advancement of trade, the courts were quite willing to give them judicial sanction and make them a part of the law of the land.

**281. Formal requisites of negotiable paper.**—While we have set out particular forms of a bill of exchange, a promissory note, and a check, this has not been done for the purpose of giving the impression that those exact forms must be used. It was decided long ago that although the usage of merchants required negotiable paper to be in writing (so that there should be no dispute about its terms), it did not prescribe any precise form of words. And yet, negotiable paper must possess certain characteristics, which may be stated as follows: (*a*) It must be in writing and signed; (*b*) it must contain an unconditional order or promise to pay a certain sum of money; (*c*) it must be payable at a determinable time; (*d*) it must be payable to order or to bearer; (*e*) a bill of exchange (including check) must name or indicate the drawer. Let us consider these characteristics very briefly.

**282. Parties who must sign.**—In the case of a bill of exchange the first party to sign it in the regular course of business is the drawer, and the next one is ordinarily the drawee—that is, the person on whom the bill is drawn—who writes across the face of the bill his name, and over his signature the word “accepted.”<sup>1</sup> Thereafter he is called the acceptor instead of the drawee. If the bill is payable to the order of some person he (who is called the

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<sup>1</sup> Formerly in England the drawee of a bill could accept it orally, and such is still the rule in some of our States. But by the usage of merchants, as well as by modern statutes in England and in many of

payee) must indorse it if he wishes to transfer the instrument to another person. This is ordinarily done by writing his name on the back of the bill.

A promissory note must be signed by the maker, and if payable to order the payee must indorse it, as in the case of a bill of exchange, in order to pass title. A check must be signed by the drawer, but the bank on which it is drawn is not expected to accept it, and therefore does not as a rule sign it. The payee may transfer it by indorsement, as he may a bill or a note.

**283. An unconditional order or promise.**—It is evident that an order from one man to another to pay a sum of money, upon some condition, could not perform the functions of a bill of exchange; it could not be used in lieu of money to pay a debt at a distant place. A payee or indorsee would not take it instead of money if its payment by the drawee depended upon an uncertain event. For example, A draws an order on B to pay a thousand dollars to C, in case certain goods which A has shipped to B arrive and sell for that amount or sum. If they do not arrive, or do not sell for a thousand dollars, neither A nor B is bound to pay anything on the order to C. Of course C will not take such an order in lieu of a thousand dollars in money. For similar reasons a promissory note must contain an unconditional promise to pay a certain sum of money. The term “money” in this connection means that which is legal tender in payment of debts at the place where the bill or note is payable. Legal-tender money of the United States was described in the chapter on Contracts.

**284. Time of payment.**—This is usually fixed at a certain number of days or months after date, or at a prescribed date in the future. Such definiteness of date, however, is

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our States, an acceptance must be in writing on the bill. This is a proper requirement, for it enables any one who receives the bill to tell at once whether it has been accepted.

not essential. A promise to pay on demand, or on the occurrence of an event which is certain to happen, is sufficiently definite. For example, A promises to pay to the order of B a thousand dollars on the death of C. This is deemed payable at a determinable future time, for the death of C must happen at some time, and the paper would be treated as negotiable. Had the promise been to pay when C married, or when he became twenty-one years of age, the paper would not be negotiable, for neither of those events is certain to happen.

**285. Payable to order or bearer.**—An instrument may be in all other respects a bill of exchange or a promissory note, and yet, if it is not payable to order or bearer it is not negotiable. It is true that neither the word “order” nor “bearer” is necessary, although one or the other is ordinarily used; but if these are not employed some other language of equivalent meaning must take their place. By the use of such words or language the parties to the paper authorize the payee to transfer it, and bind themselves to pay it to such transferee or to any subsequent holder.

It is here that we have one of the striking differences between negotiable paper and a common-law contract, a difference due to the usages of merchants. In our chapter on contracts we saw that the common law did not permit the assignee of a contract to sue upon it in his own name, but forced him to sue in the name of his assignor. The law merchant, as developed in the merchants’ courts and afterward adopted by the common law, gave the right to a transferee of negotiable paper to sue in his own name any prior party on the bill or note.

**286. Bill of exchange must designate a drawee.**—It is very clear that you can not have a bill of exchange without a drawee. The order for the payment of money must be directed to some one or it is good for nothing as an order. The order may be so drawn, however, as to contain a prom-

ise by the drawer to pay money, in which case, although no drawee is named or designated in any way, the payee may treat it as a promissory note. Ordinarily, then, a bill of exchange, before it is negotiated by the payee, has three parties—the drawer, the drawee (who upon acceptance becomes the acceptor), and the payee. But it is not necessary that these three parties be different persons. The payee may be the same person as the drawer, or the same person as the drawee. Indeed, it has been held that one person may fill all three places, and be at once drawer, drawee, and payee of a bill. In such a case, however, the holder has his option to treat the paper as a bill or as a promissory note of the acceptor.

## § 2. LIABILITY OF THE DIFFERENT PARTIES TO NEGOTIABLE PAPER

**287. Liability of acceptor.**—Until the drawee of a bill accepts it he is under no liability on the paper, and the same rule is generally applied to a bank on which a check is drawn.<sup>1</sup> The drawee or the bank may be liable to a suit by the drawer for not honoring the paper—that is, accepting the bill or cashing the check—but he is not liable on the paper itself. He has not become a party to it. The drawee does become a party by acceptance. By this act he binds himself absolutely to pay the bill in accordance with its terms. It is true that he does not state such a promise in words. Ordinarily he writes across the face of the bill “Accepted,” and below that his signature, but the law merchant gives to that word and signature this meaning: “Being indebted to the drawer of this bill, I hereby agree to pay it according to its terms, and to charge the amount to the drawer’s account.”

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<sup>1</sup> In a few of our States it is held that a bank which refuses to pay a check, when it has funds of the drawer which should be applied to its payment, is liable to an action by the holder of the check.

**288. Liability of the maker of a promissory note.**—This is absolute, like the liability of an acceptor of a bill, and it is stated in express terms. Even when the bill or note is payable at a designated time and place its presentment at such time and place is not a condition of the acceptor's or maker's liability. As a rule, of course, the holder does present it and ask for payment, but he is not bound to do so, in order to maintain a suit against the acceptor or maker. If, however, he does sue without so presenting it, the acceptor or maker will escape the payment of the costs of the suit and interest by showing that he was ready and able to pay at the stipulated time and place.

**289. Other engagements of acceptor and maker.**—In addition to his absolute promise to pay, the maker of a note engages that the payee is in existence and has legal capacity to indorse the paper. The acceptor of a bill makes the same engagement; and he also agrees that the drawer is in existence, that his signature is genuine, and that he has legal capacity and authority to draw the bill. Accordingly, a bank which pays a check, or a drawee who accepts or pays a bill, having a forged signature of the drawer, must stand the loss, as against a person who paid value for the paper in ignorance of the forgery. The drawee is bound to know the drawer's signature.

**290. Qualified acceptance.**—Thus far we have been considering the case of the regular acceptor. At times, however, the drawee is not willing to accept the bill in accordance with its terms. He insists upon qualifying his acceptance, by adding some condition, such as making payment by him conditional upon his receiving goods or funds from the drawer, or such as changing the time or the place of payment. The holder has the right to say to such drawee: "I will not take your qualified acceptance. If you will not accept absolutely, I shall treat the bill as dishonored by you, and have it protested at once." Indeed, this is the

only safe course for the holder to pursue; for if he receives a qualified acceptance he discharges the drawer and indorsers from their liability on the paper, unless they have authorized or assent to such acceptance. This is entirely reasonable, for they have a right to stand upon the very terms of the paper which they signed.

291. **Certified checks.**—A check, as we have pointed out in a preceding paragraph, is not intended for acceptance by a bank. In the ordinary course of business it is paid and canceled by the bank on which it is drawn upon its presentment there. Occasionally, however, a check is certified—that is, the bank by the proper officer writes or stamps across the face of the check “accepted,” “good,” or some equivalent word, and writes the date and the signature of the officer—generally of the cashier or teller. A certification, so far as the bank is concerned, is treated as the equivalent of an acceptance. Therefore, the bank is liable to the holder of the check, as it would have been had it accepted a bill of exchange. The effect of a certification upon the drawer’s liability depends upon who secured it. If the holder did, it discharges the drawer entirely, for the latter’s direction to the bank was to pay and cancel the check, not to certify and thus keep it in circulation. The holder by taking the certification instead of cash accepts the bank as his sole debtor and releases the drawer. But no such consequence follows a certification made at the request of the drawer. He procures the certification in order to add the credit of the bank to his own credit on the paper, and thus induce the payee to take it in lieu of money. He uses it as an accepted bill of exchange, and is liable as the drawer of one.

292. **Liability of the drawer.**—If the reader will examine a bill of exchange or a check, he will discover that the drawer does not expressly promise anything. He simply directs the drawee to pay money to the order of a desig-

nated person or to bearer. Here, again, the law merchant implies from the conduct of a party certain promises or engagements. For value received by him, the drawer draws a bill on his debtor, and delivers it in lieu of money. By so doing, says the law merchant, he engages that the payee is in existence and has capacity to indorse the bill; and he also engages that the drawee will accept and pay the bill, if duly presented; and further, that if the drawee does not, he will pay it to the holder, provided due proceedings upon dishonor are taken. It will be observed that the drawer's liability is not only implied, but that it is conditional for the most part. The acceptor promises absolutely to pay. The drawer's engagement to pay is conditional upon due presentment to the drawee or acceptor, and upon due proceedings being had on dishonor. What those proceedings are we shall consider hereafter.

**293. Liability of indorser.**—This also is implied and conditional. Take, for example, the simplest form of indorsement, that which is known as an indorsement in blank. This consists simply in the signature of the payee written on the back of a bill or note and the delivery of the paper to the indorsee—i. e., the person to whom title is transferred by the indorser. From that signature and act of transfer the law merchant implies the following engagements on the part of the indorser: (*a*) That the bill or note in question is genuine and valid in every respect. (*b*) That his title to it is perfect, and that he gives such title to the indorsee. (*c*) That all parties prior to him on the paper had full legal capacity to contract. (*d*) That the paper will be accepted or paid, if duly presented, and that if it is not he will pay it, provided due proceedings upon dishonor are taken.

**294. Various kinds of indorsement.**—Besides the blank indorsement described in the preceding paragraph there are other kinds, of which the most important are the spe-



cial, the restrictive, and the qualified indorsement. Suppose John Smith is the payee of a bill or note; a special indorsement by him would be in this form: "Pay to John Jones or order, John Smith." This indorsement specifies the person to whom or to whose order the paper is to be paid thereafter, and the indorsement of John Jones is necessary to the further negotiation of the paper. A restrictive indorsement may take one of the following forms: "Pay to John Jones only, John Smith," or "Pay to John Jones for collection, John Smith," "or "Pay to John Jones for the account of Jesse James, John Smith." In either case it will be observed the indorsement restricts the full and free negotiation of the paper thereafter. A qualified indorsement usually consists in adding "without recourse," or words of similar import, to the signature of the indorser. This indorsement does not affect the further negotiation of the paper, but it does relieve the indorser from all liability to pay the paper, if prior parties do not.

295. **Accommodation parties.**—Originally there were no accommodation parties to negotiable paper, for as we have seen, such paper was used only to transfer trade debts from one place to another. At present, however, negotiable paper of all kinds is often used as an instrument of credit. It serves as a species of paper currency. A wishes to borrow ten thousand dollars at his bank. He is told that if B will make a note to his order, or will accept a bill of exchange drawn by him to the bank's order, he can have the money. Thereupon B becomes the maker of the note, or the acceptor of the bill, to accommodate A and enable him to borrow the money. B is liable to the bank on such paper, or to any subsequent holder of it. It is true B did not get any benefit from the transaction; he simply lent his name to A. But the bank sustained a detriment—parted with ten thousand dollars—at B's request and upon his promise to pay that sum. Accordingly, here is a valid contract between

B and the bank. But B is under no obligation to A on the bill or note. It is true he appears to be on the face of the paper. If A sues B, however, the latter can show that there was no consideration for his promise to the former, and hence no contract binding on him. Of course, a person may be an accommodation drawer, or indorser, as well as maker or acceptor. In either case he is liable to a holder for value of the paper, but not to the party for whose accommodation he signed.

**296. Delivery necessary to the validity of negotiable paper.**—It is a fundamental rule of the law merchant that any contract on a negotiable instrument, whether that of acceptor, maker, drawer, or indorser, is incomplete and may be revoked, until delivery thereof with the intent to give effect thereto. Hence, if A makes or indorses a note to B's order, intending to deliver it to him the next day, but dies before delivery, B has no title to the paper. Again, if A makes a note to B's order and hands it to him, upon condition that it shall not take effect until B delivers certain property to him, and B never delivers the property, the note is not a contract in B's favor. In such a case, however, B may, if he is dishonest, give a perfect title to the note to a *bona fide* holder. What constitutes such a holder we shall explain hereafter.

### § 3. PROCEEDINGS ON DISHONOR

**297. How negotiable paper is dishonored.**—A promissory note is dishonored by the maker's failure or refusal to pay it at maturity. A check is dishonored by the bank's refusal to cash it upon due presentment. A bill of exchange is dishonored by the drawee's refusal to accept it when duly presented, or, if he has accepted it, by his failure or refusal to pay it at maturity.

**298. What is due presentment?**—We have seen that presentment of negotiable paper for payment is not necessary

in order to maintain an action against an acceptor of a bill or the maker of a note unless such presentment is expressly stipulated for in the paper. Such presentment is necessary, however, in order to maintain an action against the drawer or indorsers, unless the paper was made for their accommodation. This follows from the conditional character of their liability, which we described in the last section.

Let us now consider what constitutes due presentment of negotiable paper. It usually involves an exhibition of the paper and a demand of payment by the holder or his authorized agent. As a rule presentment is made by an agent—a notary public—whenever the holder has reason to believe it will be dishonored. If the paper is payable, by its terms, at a particular place—a designated bank, for instance—it must be presented there. If no place of payment is specified, but the address of the acceptor or maker is given, it may be presented at such address. Otherwise it may be presented at the acceptor's or maker's place of business or his residence; or if he has neither, then at his last known place of business or residence, or to him personally wherever he can be found.

**299. Time of presentment.**—In the absence of some valid excuse, the paper must be presented at a reasonable hour of the day when it is payable, which is also called the day of its maturity. This is ordinarily fixed by the paper itself—e. g., thirty days, three months, or some other period after date. The law merchant added certain days of grace—usually three days to this period. Accordingly, a note or bill, dated April 1, and payable three months after date, matured or became due on July 4. But as that is a “great holiday” in this country, the law merchant would make the paper payable on July 3—that is, on the second day of grace. In some of our States days of grace are abolished by statute, and paper which falls due on a legal holiday or on Sunday is made payable on the next secular or business day.

Such is the present rule in New York. Hence, if negotiable paper falls due by its terms on July 4, and that day is a Saturday, the proper day for presenting it for payment is the following Monday—July 6.

**300. Reasonable hour.**—This varies according to the place of payment. When the paper is payable at a bank it must be presented during banking hours. If those hours begin at ten in the forenoon and close at three in the afternoon a reasonable hour means an hour between ten and three. When the paper is payable at a person's place of business, it must be presented during ordinary business hours. When it is payable at his residence, it must be presented after the customary hour of rising and before the customary hour of going to bed—such hours being determined not by the habits of the individual upon whom presentment is made, but by the general custom of the neighborhood.

**301. Delay in making presentment** is excusable whenever it is caused by circumstances beyond the holder's control. The following are examples of such a state of things: The interruption of intercourse with the place where the paper is payable by reason of war or of the prevalence of a contagious disease such as smallpox; the miscarriage of the mails; illness of the holder which disables him from arranging for prompt presentment. As soon as the cause of delay ceases to operate, presentment must be made with reasonable diligence.

**302. Presentment may be dispensed with.**—Not only is delay in presenting paper excusable, as stated in the last paragraph, but at times it may be dispensed with altogether. If the drawer and indorsers waive presentment, or if the bill or note was accepted or made for their accommodation, presentment is unnecessary. So, if the acceptor or maker is fictitious; and again, if, after reasonable diligence, presentment can not be made; as where the acceptor or maker

can not be found within the State, upon reasonable inquiry, and has no known place of business or of residence within the State. For a holder is not under any duty to go outside the State to make presentment.

**303. Protest of negotiable paper.**—We have said that the holder usually employs a notary public to present negotiable paper for payment, if there is reason to believe it will not be paid. This he does for two reasons: First, because the notary is familiar with the steps to be taken upon the dishonor of the paper. Second, because a formal protest of the paper is regularly made by a notary who has a seal, and who is thus able to make an official certificate of what he has done. We say this is regularly made upon the dishonor of negotiable paper, whether foreign or domestic; whether a bill of exchange, a check, or a promissory note. It is not necessary, however, in every case. The only form of negotiable paper which *must* be protested in order to hold the drawer and indorsers is the foreign bill of exchange. And, it will be remembered, a bill drawn in one of our States and payable in another is a foreign bill.

**304. Why foreign bills must be protested.**—Simply because such was the ancient custom of merchants. We can easily understand the convenience of such a protest. A New York merchant draws a bill on his London debtor and gets it discounted by a New York banker. It is sent to London and dishonored by the drawee. It then comes back to the New York banker, who calls upon the merchant for the money advanced to him on the bill with interest and the expenses of protest. If the banker had to call from London the person who presented the bill and to whom refusal of acceptance or payment was made in order to prove the dishonor of the paper it would be a great burden. Accordingly, mercantile usage provided, at an early day, that a certificate of protest by a notary public should be received in lieu of his personal testimony. Of course, such a certificate

is not conclusive evidence of the truth of its statements. The party against whom it is offered may show, if he can, that it is false; but until that is done courts everywhere will accept it as sufficient proof that the paper has been dishonored.

**305. Different significations of protest.**—The term “protest” is often used in a loose way to include all the steps taken upon the dishonor of a bill or note—presentment and demand, refusal, protest by the notary, and notice of dishonor. As a technical term of law, however, it means simply to bear public witness—to declare in a formal manner—that a certain negotiable instrument has been dishonored.

**306. Manner of protesting paper.**—Upon the dishonor of the paper the notary usually makes a note or memorandum of the fact on the instrument. This should be done on the day of its dishonor. Thereafter he fills out, signs, and attaches his seal to the formal certificate of protest, of which the following is a specimen:

UNITED STATES OF AMERICA,    }  
STATE OF NEW YORK.            } ss. :  
CITY AND COUNTY OF NEW YORK.

On the 24th day of February, 1902, at the request of the CORN EXCHANGE BANK, UNIVERSITY BRANCH, I, T. B. JOHNSON, a Notary Public of the State of New York, duly commissioned and sworn, did present the original Promissory note hereunto annexed, at the CORN EXCHANGE BANK, UNIVERSITY BRANCH, No. 2902 Broadway, New York City, the place at which it was payable, and demanded payment, which was refused,

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Whereupon, I, the said Notary, at the request aforesaid, did Protest, and by these presents do publicly and Solemnly Protest, as well against the Indorser of the said note as against all others whom it doth or may concern, for exchange, reexchange, and all costs, dam-

ages, and interest already incurred and to be hereafter incurred for want of payment of the same.

Thus done and protested in the city of New York aforesaid.

IN TESTIMONIUM VERITATIS.

{ NOTARY'S }  
{ SEAL. }

T. B. JOHNSON, *Notary Public*,  
*Corn Exchange Bank, University Branch.*

It will be observed that the certificate of protest has the bill or note, or a copy thereof, annexed to it, and that it specifies the time and place of presentment, the fact that a presentment had been made, and the cause for protesting the paper.

**307. Notice of dishonor.**—Although, as we pointed out above, this is often included in the term protest, the two are entirely distinct. A protest, as we have seen, is necessary only in the case of a foreign bill of exchange; but a notice of dishonor is just as necessary in the case of an inland bill, of a check, or of a promissory note as in the case of a foreign bill. A protest is in writing, and attested by the notary's signature and seal. A notice of dishonor may be in writing or oral, and may be given personally or sent through the mails. It may be quite informal. Any notice is sufficient which fairly identifies the instrument and indicates that it has been dishonored. Of course, it is safer to have the notice in writing, in order to avoid any dispute about its terms. The following is a standard form used by notaries:

NEW YORK, May 2, 1902.

PLEASE TO TAKE NOTICE that a note made by John Jones for \$500 and interest, dated February 1, 1902, payable at the Corn Exchange Bank, University Branch, May 1, 1902, and indorsed by you, has been dishonored, payment having been duly demanded at its maturity and refused, and that said Note has therefore been PROTESTED for non-payment and that the holders look to you for payment thereof, and of all damages, costs, and charges thereon.

Yours, etc.,

T. B. JOHNSON, *Notary Public*,  
*Corn Exchange Bank, University Branch.*

TO JAMES SMITH.

**308. Why notice of dishonor is required.**—This is because the contract of a drawer of a bill, or of the indorser of a bill or a note is conditional. His promise is not absolute, it will be remembered, like that of the acceptor or the maker. He undertakes to pay provided due proceedings upon dishonor are taken. One of these proceedings, according to immemorial usage of merchants, is giving notice of dishonor to the drawer and indorsers. This is certainly a perfectly fair usage. In the ordinary course of business the drawer draws the bill against funds in the drawee's hands. If the drawee refuses to accept, or, having accepted, refuses to pay, the drawer ought to be promptly notified so that he may get his funds out of the hands of one who is treating him unfairly, perhaps dishonestly. A similar reason exists in favor of the payee of a note or of a bill who has indorsed it to a third party. The bill or note is given to the payee for a debt owing to him by the drawer or the maker. If this debtor does not pay it at the time and in the manner agreed upon in the bill or note, the creditor should be notified at once, so that he may take immediate steps to compel payment.

**309. Time of giving notice.**—Three centuries ago the usage of merchants on this point was not very definite; it only required notice to be given within a reasonable or convenient time. At present the rule is quite definite, although special and unusual circumstances may excuse delay, or may relieve the holder altogether from giving notice. The rule is as follows: If the party giving notice and the one receiving notice reside in the same place, personal notice must be given during the day following the dishonor, and notice by mail must be put into the post-office in time to reach him in usual course on the day following dishonor. If the parties live in different places, and notice is given by mail, it must be deposited in the post-office in time to go by mail the day following dishonor, or if there be no mail at a



convenient hour on that day, by the next mail thereafter. When notice is given otherwise than by mail it must be given within the time the notice would have been received in due course of mail had it been deposited in the post-office within the time specified in the last sentence.

310. **Where notice by mail should be sent.**—The use of the mails for giving notice of dishonor had its origin in business usage, but it is now regulated quite generally by statute. As a rule, when notice of dishonor is duly addressed and deposited in the post-office, the sender is deemed to have done his full duty, and the risk of miscarriage by the mails is thrown upon the drawer or indorser. What is a proper address depends on the facts of each case. If the drawer or indorser has added an address to his signature the notice must be sent there. If the address is indefinite, as “John James, New York city,” instead of having the street and number of his residence or place of business, the fault is John James’s and not the sender’s. If no address is added to the signature, then the sender must use reasonable diligence to discover the party’s whereabouts. If, after such diligence, he fails, he is excused from giving notice. If he is successful, notice must be addressed as follows: either to the party’s place of residence or to his place of business, or to the post-office where he is accustomed to receive his letters, though that may not be the post-office nearest his residence.

#### § 4. THE RIGHTS OF A HOLDER

311. **How acquired.**—The rights of a holder of negotiable paper are acquired by its negotiation to him. The term negotiation is here used in a technical sense, it must be borne in mind. We often speak of the negotiation of a treaty between nations or of a contract between individuals. The word has then a very different meaning to that which at-

taches to it in its present connection. It includes all the acts and words of the parties leading up to their final agreement. In the law of negotiable paper, however, negotiation means such a transfer of the paper as gives to the transferee a right to sue upon it in his own name. It may, also, and generally does give him a right to enforce the paper free from defenses which could have been set up against the transferor. If the paper is payable to bearer its negotiation consists in its transfer by mere delivery; if payable to order, in its transfer by indorsement, which, it will be remembered, also includes delivery.

312. **A holder in due course, or bona fide.**—A person is said to be a holder in due course, or a *bona fide* holder, of paper, when it has been negotiated to him, before it is due, for value and without notice on his part of any defect in the title. These three elements we shall explain with some fullness presently. Meanwhile let us call attention to the fact that a finder or a thief may give a perfect title by negotiation. This he may do when the paper which is lost or stolen is transferable by delivery—that is, when it is payable to bearer or is indorsed in blank. If he could not do this, negotiable paper would be robbed of one of its chief characteristics—its similarity to money; and all know that a thief can give a perfect title to money which he has stolen. Otherwise it could not perform its functions as currency. It follows from the foregoing doctrine that one ought not to send by mail, or by a messenger in whom he has not perfect confidence, or leave in a place where it may be stolen, any negotiable paper payable to bearer or indorsed in blank.

313. **Transfer after due.**—While negotiable paper, transferred after it is due, may be sued upon in the name of the transferee, the latter gets no better title than his transferor had. In other words, overdue paper is negotiable in a limited sense only. This should be borne in mind, however; if the transferor were a holder in due course—that is, if it

had been negotiated to him before due, for value and without notice of anything wrong in it—his transferee, even after the paper is due, will get all the rights which he possessed.

The reason why the law merchant does not treat a person who comes into the possession of negotiable paper after it is due, as a holder in due course, is, that by the usage of merchants such paper is paid at maturity in the ordinary course of business, unless the acceptor or maker has some defense to it. His refusal or failure, therefore, to pay the paper and take it out of circulation raises the presumption that there is something wrong about it. This reason may be stated in another way: By the usage of merchants, negotiable paper is intended to take the place of money—to serve as a paper currency—only until it is due. At maturity it is to be paid and retired.

**314. Paper payable on demand.**—When paper is payable at a fixed date, or at a certain time after date or sight, the day of its maturity is easily determined. This we dealt with on a preceding page. Paper payable on demand (which includes paper expressed to be payable on demand, or at sight, or on presentation, as well as that in which no time of payment is expressed) is due for certain purposes the moment it is issued. For example, the holder may sue on it at once, and hence the statute of limitations begins to run at once. But it is not overdue until the expiration of a reasonable time after its issue. What is a reasonable time will vary with the circumstances of each case, but ordinarily it does not extend beyond a few weeks, and at times not beyond a few days. Until the expiration of a reasonable time from its issue, it may be negotiated so as to give the transferee all the rights of a holder in due course. Still again, if such paper does not contain an express promise to pay interest, interest will not begin to run until a demand is made. But it is generally held that the commencement

of a suit on the paper is equal to a formal demand, and sets interest running thereon.

315. **For value.**—Negotiable paper was devised by merchants, as we have seen, to take the place of money. It was given for value received, and was transferred for value. A man who did not pay value for it did not take it in the ordinary course of mercantile business; he did not become a holder in due course. Hence he was not entitled to the protection which the usage of merchants gave to the one who had paid value for the bill.

It is not necessary that one should pay the full face value of the paper in order to become its holder in due course. It is enough that he gives any valuable consideration, provided he takes it before due and without notice. But the amount that he gives for the paper always has a bearing on the question, Did he take it without notice? If he paid full value, that fact indicates that he had no notice of any defect in his transferor's title; for a person is not apt to pay the full value for paper to which he knows or even suspects that the maker or acceptor has a good defense. On the other hand, if he paid but little for the paper, that fact in connection with others might convince a court or jury that he suspected the title of his transferor.

316. **An old debt as value.**—Whether a person who takes negotiable paper in payment of an old debt, or as collateral security for its payment, is a holder in due course, is a question on which the courts of this country are hopelessly at variance. Many of them hold the view, which has long prevailed in England and in the Federal courts, that he is. This view has been embodied in the negotiable instruments law, a statute which has been enacted in a number of our States, for the purpose of codifying and rendering uniform the rules of law relating to negotiable instruments. The courts of other States declare that such a person is not a

holder in due course, and that his title is no better than that of his transferor.

**317. Taking without notice.**—Upon this topic the courts are substantially of one mind. If paper has been negotiated to one before due and for value, he is deemed a holder in due course, unless he is shown to have had knowledge of something wrong in the paper, or to have known such facts that taking it without further inquiry amounted to bad faith. It is not enough that he acted carelessly or even stupidly. He must have acted in bad faith. To illustrate: A number of negotiable instruments payable to bearer were stolen from X. He gave notice of the fact at once to a great many bankers, and ordered payment of these instruments stopped by the makers. Some months later a person sold one of these instruments to Y for full value. Thereafter he presented it for payment when it fell due, and the maker at X's request refused to pay. Y sued the maker, who proved that one of the notices sent out by X had been received by Y and was in his office when he bought the paper. Y replied that he had forgotten all about the notice, and bought the paper without any thought or suspicion that the seller's title was defective. The jury found that Y acted honestly in the matter, and accordingly he recovered.

**318. Holder in due course takes title free from personal defenses.**—Having seen what constitutes a holder in due course, let us now consider the nature of his title. We have said that he may take a better title than his transferor had; that he may enforce the paper free from certain defenses which might have been set up successfully against the transferor. These defenses are called equitable, or personal. Let us illustrate these terms by a concrete case. A sells a horse to B for two hundred dollars, having induced B to purchase by false representations that the horse is sound and safe. B makes and delivers his promissory note for the price to A's order, payable three months after date. When

it is due he refuses to pay it. A sues him, and B sets up as a defense that A cheated him; that the horse was so unsound and vicious as to be good for nothing, and that it had been tendered back to A, who refused to receive it. That is a good defense. It is inequitable that A should enforce the payment of the note. Hence the defense is sometimes spoken of as an equitable one. Had A negotiated the note to C before due, for value and without notice, the latter could have enforced it free from that defense—that is, the defense is personal against A, or one who has no better title than A, but it is not available against a holder in due course.

**319. Real or absolute defenses.**—These are available against any holder of the paper. They are called “real,” because they attach to the *res* (the thing)—i. e., the paper itself. They are called absolute defenses in order to contrast them with the equitable defenses referred to in the last paragraph—i. e., defenses based upon the unfairness or injustice of the plaintiff’s attempt to enforce the paper. Legal incapacity of a person to make a contract is a real or absolute defense. An infant maker of a note or acceptor of a bill can plead his legal incapacity and avoid the instrument even against a holder in due course. Such a holder must look for redress from his indorser. The indorser would be liable to the holder whether he indorsed with knowledge of the maker’s or acceptor’s infancy or not, for the indorser, it will be remembered, impliedly engages that the paper is valid.

Another example of a real or absolute defense is afforded by the alteration of negotiable paper. A note is made for one hundred dollars, and is changed to one for a thousand dollars. Though the alteration may have been made so skilfully as to render detection by the holder impossible, it is an absolute bar to his recovery against the maker, or any one who became a party prior to the alteration. His

only claim is against his transferor and those who indorsed, and thus guaranteed the validity of the paper after its alteration.

**320. Fraud in securing the signature.**—This, too, may be a real defense. For example, A contracted with B to sell grain-seeders, and asked B to write his signature on a piece of paper to be sent to the manufacturers of the seeders, so that they might know his signature when he ordered machines. Later A wrote a promissory note for a thousand dollars over B's signature, and negotiated it for full value to C, who took it before due and without notice of A's fraud. B refused to pay the note. C sued him and was beaten. B's defense, that he never signed the note, was available against any holder.

At times persons are tricked into signing papers which are misread or misdescribed to them. X is asked to sign a contract of agency for the sale of some article; or a contract of guarantee that Y will pay for certain property if it is sold to him; or to sign a paper as a witness to Y's signature. Trusting to the statement of the nature of the writing, he does not examine it before signing. It turns out that the paper thus signed is a bill of exchange or a promissory note. Of course he has a good equitable or personal defense against Y. Whether he has a real or absolute defense against a holder in due course depends upon whether he acted negligently in signing the paper. If his conduct was not negligent his defense is absolute. Otherwise the holder in due course will recover. The distinction between the two classes of cases mentioned in this paragraph is this. In the first the defendant does not sign any paper. In the second he knows he is signing something. It is his duty, therefore, to use reasonable diligence to learn what the paper is.

## CHAPTER IX

### PARTNERSHIP—JOINT-STOCK COMPANIES—CORPORATIONS

#### PART I.—COMMON LAW PARTNERSHIPS

##### § 1. THE NATURE OF PARTNERSHIPS

321. **What is a partnership?**—Judges and writers upon law have found no little difficulty in defining a partnership. In England and in some of our States it has been defined by statute. The English partnership act of 1890 declares that “partnership is the relation which subsists between persons carrying on a business in common with a view of profit.” According to the civil code of California, “partnership is the association of two or more persons for the purpose of carrying on business together, and dividing its profits between them.” In New York, the Legislature has declared that “a partnership, as between the members thereof, is an association not incorporated, of two or more persons who have agreed to combine their labor, property, and skill, or some of them, for the purpose of engaging in any lawful trade or business, and sharing the profits and losses as such between them.”

If we examine these definitions carefully we shall discover that they concur in requiring for a partnership (1) a voluntary association of two or more individuals, (2) in carrying on a business owned by them in common, and (3) conducted for profit.

322. **The agreement of parties is essential.**—A partnership is a voluntary association of individuals. No one is



forced into the relation. One can not be made a partner without his consent. True, partnerships are often entered into without any formal articles of agreement, although it is always wiser to have the agreement put into writing; but there can never be a partnership without a contract therefor between the partners. We shall discover the reason for this rule when we come to discuss the powers of a partner, and learn that he may sell firm property and may contract firm debts without the actual consent of his copartner. A partner is so at the mercy of his copartners that the law secures to him the right to select them; to decide for himself who shall be and who shall not be his associates in this relation.

It is not to be understood, however, that a person may not make himself liable to third persons as a partner, although he is not a partner in fact. For example, A says to C: "I am in partnership with B. Any goods which he orders from you will be ordered for the firm." There is no such partnership. C receives an order from B and fills it. He can recover from A as though he was in fact a partner. Having induced C to part with his goods, by representing that there was a partnership between himself and B, he is estopped from showing there is no partnership. The same rule applies wherever a person holds himself out or permits himself to be held out as a partner. "Holding out" is often practised by having one's name on the firm sign, or on the firm letter-heads, or in the firm circulars or advertisements, but these are not the only forms which it takes. Any representation which a man makes or suffers to be made for him, either by words or by conduct, that he is a partner in a particular business, amounts to a "holding out" by him.

**323. Specific intent to form a partnership is not necessary.**—While a person does not become a partner without his consent to a contract of partnership, he may enter into

the relation without intending to do so. He may think, and his lawyer may advise him, that a contract which he is about to make will not create a partnership. They may be mistaken as to the legal nature of the contract. It may result, although they think it will not, in making him and others owners of a business carried on by them in common with a view to profit. If it does he is a partner although he did not intend to become one. A person who becomes a stockholder in a cooperative grocery-store is a partner with the other stockholders, if goods are to be sold to outsiders at a profit, whether he thinks this is a partnership or not. If the store were opened, however, simply for the benefit of its members, its purpose being the purchase of goods and their distribution among the members at wholesale prices, the stockholders would not be partners. Nor would the result be different if they thought they were organizing a partnership and called it by that name. In short, it is not the secret intent of the parties nor their language, but the substance of their contract, which determines whether a partnership has been formed or not.

**324. Carrying on business together.** (a) **It must be lawful.**—If the reader will refer to the first paragraph of this chapter he will notice that in only one of the definitions is the express statement made that the business must be lawful. Such is the rule, however, in every jurisdiction. Nearly two hundred years ago a highway robber had the rashness to bring an action in England against his copartners, who had refused to divide the spoils of their joint labors, amounting, as he claimed, to more than two thousand pounds. It is almost useless to say that the action was dismissed, and the plaintiff's lawyers were heavily fined for their contempt of court in bringing the suit. The plaintiff seems to have gone scot-free for the time, but we are assured that, five years later, he was hanged for some other offense. Various attempts have been made in this country

by persons engaged in an illegal business, such as carrying on a gambling-house, to compel their copartners to divide the illegal gains, but always without success. The courts refuse to protect a gambler, or other criminal law-breaker, against the cheats of his copartners.

325. (b) **Meaning of business.**—Three hundred years ago only those who were engaged in merchandising—in trading as merchants—were treated as partners. In other words, mercantile business only was carried on by partnerships. A firm, or partnership of farmers, or of real-estate dealers was never heard of. At present, however, the term “business” in partnership law includes every trade, occupation, or profession. Accordingly, we have partnerships of mechanics, of farmers, of real-estate dealers, of insurance agents, of theatrical managers, of lawyers, of doctors, and many others. Still, the old, narrow conception of “business” lingers on in some lines of work, such as farming on shares. A lets his farm, with its stock and implements, to B, who agrees to cultivate it for a year on shares—that is, to receive a share of the profits of the farm, the remainder to go to A. This is not a partnership, but a lease of the farm, A receiving his share of the profits as rent, and B his share as wages.

Again, a business means something more than doing a particular piece of work. Two carpenters agree to make certain repairs for a certain sum upon the house of A, who furnishes all the material; or two lawyers agree to try a lawsuit for B for a stipulated sum; here is no indication that the carpenters or the lawyers have entered into a partnership. They are not carrying on a business, but are doing a single, isolated piece of work.

326. (c) **A common business.**—Not only must persons be engaged in carrying on business in order that they be partners, but they must own that business in common. Hence, a pooling arrangement is not a partnership. Com-

mon carriers often agree to pool the receipts of their business between points where they are competitors, as between New York and Chicago, and divide the sum total in certain proportions. Each carrier controls his own business as before the arrangement was made—has his own means of conveyance, his own servants, and pays his own expenses, and collects for his services. At the end of the year the sums received by the different carriers are added together, and the share of each in that aggregate under their agreement is determined. If one has collected more than his share the surplus must be handed over by him to the others. If he has collected less he is entitled to the deficit from the others. But there is no partnership, and each carrier is liable for his own debts and not for those of the other members of the pool.

327. (*d*) **Sharing the profits of a business.**—A hundred years ago it was understood to be the law, both in England and in this country, that if one person was to receive from the owner of a business a share of its profits, for money loaned or for property leased or sold, or services rendered to the owner in such business, they were partners as to third persons. But that view has been discarded by the English courts, and by nearly all of the courts in this country. Unless the person loaning the money or supplying the property, or rendering the services is to become one of the proprietors of the business, he will not be a partner, for he will not be carrying on the business in common with the other.

328. **Business must be carried on for profit.**—The institution of partnership was devised by merchants, who carried on business for gain. They did not combine their skill and capital for charitable or benevolent purposes, but for those of trade. Money profit is still the aim and end of partnership. Persons who form associations for any other purpose are not partners. A musical society, an athletic

club, a political committee, a masonic or other lodge, a religious association, a social-reform organization, or any similar body of persons is not a partnership. It may own property, it may have a treasury, it may charge admission fees to games or entertainments, but it is not a partnership, for the simple reason that it is not a business association existing for the sake of making money. Accordingly, its members are not agents for the association or for the other members in making contracts or incurring obligations. A person who sells goods to such a body must look for his pay to the members who ordered them and those who actually authorized or have since ratified the purchase.

## § 2. PARTNERSHIP PROPERTY

329. **It starts with the firm's capital.**—One of the chief reasons for forming a partnership is the accumulation of a fund larger than any one partner is able or willing to embark in the business. This fund is known as the firm's capital. It may consist of money, or of goods, or of land. The partners may contribute equally or unequally to it. One may furnish all the capital, while the other or others contribute skill and experience, which are thought to be quite as necessary to the success of the enterprise as money. At times a partnership has very little money capital, as in the case of a firm of insurance agents, or of physicians or of young lawyers. In every case, however, as soon as the capital has been contributed and the partnership has been organized, that capital ceases to be the separate property of the partners, and becomes the property of the firm. With it the firm carries on its business and acquires other property.

330. **The firm as a person.**—By the custom of merchants a partnership is treated very much as though it were a corporation—an artificial person. Not only is it the owner

of the firm property, but it may make contracts with the persons who compose it. In partnership bookkeeping the firm appears as a debtor to its different members for its capital, as well as for any money which they may lend it. On the other hand, it appears as creditor of each partner for the amounts which he draws out of the business. One partner often gives promissory notes to the firm for money borrowed from it, and receives its promissory notes payable to his order for money which he has loaned to it. In all such and many other transactions, mercantile custom recognizes the personality of the firm. But this custom has not become a part of the common law. While for certain purposes it treats partnership property as though it were owned by the firm as a person, it makes a sharp distinction between a partnership and a corporation. The latter is an artificial person, but not so the former at common law.

**331. Partnership real estate.**—This distinction comes out very clearly in the case of lands. Suppose a corporation is duly chartered under the name of John Smith & Sons. A deed of land to the corporation in that name passes a perfect title to it, and it can convey the land in that name to another. But if John Smith & Sons is the firm name of a partnership composed of John Smith, Jacob Smith, and Nelson Smith, and certain land is bought with firm funds and for firm use, the deed should name the three men as grantees. If the land is sold by the firm their individual names should be used as those of the grantors. This is because the common law refuses to treat a partnership as an artificial person.

**332. Firm property after the death of a partner.**—We have said that the common law treats firm property for certain purposes as though it were owned by the firm, and not by the individuals composing it. This it does upon the death of a partner. Take a firm composed of A and B. A dies. The common law has so far adopted the custom of

merchants as to treat the firm title as continuing after A's death, but controlled entirely by B. He can sell the property, convert it into cash, pay the firm's debts, and divide the balance between A's personal representatives and himself. If he does not do this promptly, A's representatives can force him to do it, or can have a receiver of the firm's property appointed to do it.

**333. Firm creditors and separate creditors.**—The common law also treats firm property as owned by the partnership, and not by the individual partners, when a contest occurs between firm creditors and the creditors of a partner. A and B are partners in a manufacturing business. They are indebted to X for coal for their factory. A is indebted to Y for coal for his house. Y gets a judgment against A for the debt, and levies his execution on firm property. The next day X gets a judgment against A and B for the firm coal, and levies his execution also on the firm property. When the property is sold it brings only enough to pay X's judgment. Y will be entitled to nothing, for his execution was not a lien on the firm title to the property, as was that of X, but only on A's individual interest in that property, which turned out to be worth nothing.

**334. A partner's share or interest in firm property.**—We have just spoken of a partner's individual interest in firm property. Perhaps the nature of this interest ought to be explained. This can best be done by comparing it with the interest which a person has in property which he owns in common with another. Suppose A and B buy a horse, each paying one-half the price. They are common owners of the horse, each one owning a one-half interest. Each may sell his interest to a third party, or that interest may be levied on and sold by a judgment creditor of either. But neither one can sell the horse without actual authority from the other.

But suppose that A and B are equal partners, and the

partnership property includes a horse. Neither partner, as an individual, owns a half interest in the animal or in any other article of firm property. All that he owns is a right to have the firm property sold, to have the proceeds applied to paying the debts of the firm, and then, and not until then, to have his proportionate share of the balance. Accordingly, his interest in the horse, referred to above, may be worth something or it may be worth nothing, but in any event it is not that of an owner in common of the animal.

### § 3. THE POWERS OF PARTNERS

335. **A majority rules.**—Unless the partnership agreement contains a provision to the contrary, any question arising as to ordinary matters connected with the business is to be decided by the majority. Even the majority, however, must act in good faith in determining such questions, and their action must relate to the ordinary business of the firm. If a partnership is formed to carry on a grocery-store, the majority can not add to this business that of selling spirituous liquors. It can decide how an agreed business shall be run, but it can not change the nature of the business.

If the firm has but two members, a deadlock may easily occur. In such partnerships the contract ought to provide that, in case of disagreement, the opinion of a particular partner shall prevail. There are certain acts, however, which one of two partners can not prevent his copartner from doing. He can not prevent his collection of debts due the firm, nor his payment of debts which it owes, nor his performance of firm contracts, nor, in most jurisdictions, his sale of firm property in the ordinary course of business. But, as a rule, he may prevent the formation of new contracts, and may even break up the partnership, although such conduct may render him liable to his copartner for damages,



**336. The agency of a partner.**—It is here that we find one of the most striking characteristics of partnership. Each partner is an agent of the firm and of his copartner for the purposes of the partnership business. Any act done by him, therefore, in carrying on in the usual way any business transaction in the name of the firm, is binding on the firm and on his copartners, unless the person with whom he deals knows that he has in fact no authority to bind them. Well may Lord Kenyon have said: "It is an imprudent thing for a man to enter into partnership with any person unless he has the most implicit confidence in his integrity. One partner may pledge the credit of the other to any amount."

It is this agency of each partner that makes it important to determine whether a particular association is a partnership or not. For example: A member of an association orders goods from B which it is accustomed to buy and use. If it is a partnership B can hold every member liable for the price. If it is not, he can hold only those members who ordered the goods, or who assented thereto, or who have ratified the purchase. Again, A and B own a number of horses. A orders hay and grain for their use from C. If B is a partner with A in their ownership, C has a valid claim against him as well as against A. But if he is not, if he and A own them in common, C has no claim against B unless he can show that B actually authorized A to order the hay and grain, or has ratified the purchase.

**337. Implied authority of a partner.**—It is plain from what was said in the last paragraph that the extent of a partner's agency depends upon the nature of the firm's business. If the partnership is one of farmers you must inquire how such a business is usually carried on before you can determine just what implied authority a partner has to act for and bind the firm. The same inquiry must be

made if the partnership is one of lawyers, or physicians, or bankers, or merchants, or manufacturers. He has implied authority to do whatever, by the general usage of that particular line of business, is ordinarily done by those who carry it on.

If the partnership is a trading or commercial one—that is, if it is engaged in buying or selling on credit—he has implied authority to hire servants, to buy and sell goods, to pay and collect debts, to borrow money, and to issue negotiable paper in the firm's name—a very extensive authority, and one which can be and has been grossly abused, to the financial ruin of innocent copartners. For a partner may buy goods or borrow money, pretending they are for the firm, then use them for his own purposes, and run away, leaving his copartners to pay for the goods or repay the money.

**338. Liability for the misconduct of a partner.**—The doctrine of a partner's agency, which we have been considering, enables him not only to subject his copartners to contract liabilities for the wages of servants, for the price of goods, or for the payment of negotiable paper, to which they never assented, and from which they never had any benefit, but it makes it possible for him to subject them to liabilities in tort. One partner goes out to collect a debt due the firm. He seizes and sells certain property which he believed was owned by the debtor, but which in fact belonged to a third party. Such owner has a perfect action in tort against all the partners for the conversion—the sale for their benefit—of this property. In short, the same rule applies here which was laid down in the chapter on Agency, that the principal (here the firm as well as each copartner) is answerable for the wrongful acts of his agent, done within the scope of his agency.

**339. Good faith toward copartners.**—Because of this great power which each partner has over the fortunes of his

associates, the law is very stringent in holding him to the utmost good faith in all his conduct toward them. If he buys goods for the firm at a bargain he must give them the full benefit of the bargain. He is bound to devote himself honestly and exclusively to the firm's business, unless the partnership contract exempts him from such duty, and he must not carry on business in competition with that of his firm.

#### § 4. THE DISSOLUTION OF PARTNERSHIP

340. **By operation of law.**—A partnership is dissolved, without any agreement or act of the parties, when the law prohibits its continuance. War breaks out between the United States and Spain. This dissolves a partnership between citizens of the two nations living in their respective countries, because commercial intercourse between the two states has become unlawful. At common law the marriage of a female partner dissolved a business partnership of which she was a member. Her interest in the firm passed to her husband, and "her legal personality for many purposes became merged in his." At present, both in England and in many of our States, married women have been relieved from this rule, and may be members of business partnerships as though they were unmarried.

A partnership is dissolved by operation of law, also, upon the natural death of a partner, or upon his bankruptcy (which event, as we have seen, is regarded as his financial death). Neither the personal representative of the deceased partner nor the assignee of the bankrupt partner has any right to enter the firm. He may be a person whom the surviving partners would not choose as a business associate, and they have the right of choice, as we have already pointed out. And yet, whatever interest the deceased or bankrupt partner had in the firm vests in and belongs to his personal representative or assignee. It is clear, therefore,

that the death or bankruptcy of a partner must dissolve the firm at once.

**341. By act of the parties.**—This is the common method of dissolving a partnership. The parties may agree in advance that it shall terminate at a certain time. When the time arrives the firm dissolves without any further act of the parties. If the term of the partnership is not agreed upon, either party may end it at his pleasure, and in this country he may so end it even when the partnership is for a fixed period. Such conduct, however, amounts to a breach of his contract, and may subject him to the payment of damages therefor; but the courts of this country do not believe in forcing a man to remain in a partnership which is distasteful to him, or which he fears will be unprofitable.

**342. By judicial action.**—A partnership may also be dissolved by a court. If the business is carried on at a loss, and the partner wishes to have the firm dissolved before the end of its term, without running the risk of a suit for damages brought by his copartner, he institutes an action in court for its dissolution. Upon showing that the business is a losing one he is entitled to a dissolution. So he is if his copartner has been guilty of serious misconduct, or if he has become insane, or is otherwise permanently incapacitated for business.

**343. Upon dissolution, firm property is to be distributed among the partners.**—As soon as a firm is dissolved its business is to be closed up, its property is to be converted into cash, its debts paid, and any balance is to be divided among the partners. It follows from this that the agency of each partner for the firm ceases upon the firm's dissolution, except as to matters which are incidental to closing up its affairs. For example, a partner is still agent for the firm in selling property; in completing contracts, which were made before its dissolution, but which were unfinished;

in collecting and paying debts. But he is not an agent for making new contracts.

In England any real estate owned by the firm is to be treated as personal property in settling up its business. It is to be converted into cash, as though it were a stock of goods. But, in this country, it is treated as personal property only so far as its proceeds are needed to pay firm debts. Beyond that point it preserves its character as real property. It descends to the heirs of partners, and their wives have dower interests in it. The nature and importance of this distinction will be made clear in the next chapter, on Property.

**344. Order of distribution.**—The property of a partnership, after it has been turned into money, is distributable in the following order: (1) Debts and liabilities, owing to persons who are not partners, are to be paid. If there is not firm property enough to pay these in full, each partner is liable for every dollar of them. (2) When all outside debts have been paid the next claims in order are those for money loaned to the firm by the several partners. If there is not enough to pay these claims in full they are to share ratably. Suppose partner A has loaned ten thousand dollars and partner B has loaned five thousand dollars, and there is a balance of seventy-five hundred dollars after paying outside debts. A and B will each receive fifty cents on a dollar of his claim. (3) The next claims to be paid are those for capital, and here again the partners share the balance in proportion to their contribution to the capital of the firm. If one contributed all the capital, he will receive all the balance. (4) If anything remains after paying the three preceding classes of claims it will be divided in the proportion in which the profits of the business were to be shared.

**345. The proportion in which profits and losses are sharable.**—This is ordinarily fixed by the terms of the

partnership agreement. If, however, it is not, the law presumes that profits and losses are to be shared equally, however unequal may be their contributions of capital by the different members. Accordingly, if A and B form a partnership with a capital of twenty thousand dollars, all of which is contributed by A, and makes a profit of four thousand dollars, one-half of this belongs to B unless they have agreed upon some other proportion. On the other hand, if they carry on business at a loss, instead of at a profit, B must make good to A one-half of such loss. If the business has been so disastrous as to sweep away the whole capital and also to leave debts to outsiders, B will be bound to pay one-half of those debts, and, besides, to pay A one-half of the twenty thousand dollars of capital. When we say that B is bound to pay one-half of the debts due to persons outside the firm, we have reference only to his obligation to A. To the firm creditors he is under an obligation to pay the whole of their claims. In other words, each partner is liable to the extent of his fortune for every debt owing by the firm. It is this liability to firm creditors which makes partnership so hazardous.

## PART II

### § 1. LIMITED PARTNERSHIP

346. **Borrowed from French law.**—Limited partnership is a style of business association not known to English common law, nor to the law merchant. It was first introduced into this country in the year 1822 by the Legislature of New York, which copied many of its features from a similar institution in French law. The experiment proved so successful that it has been repeated by most of our States and Territories.

347. **Its characteristics.**—Limited partnership has some of the features of general, or common-law partnership,

which we have been considering, and some characteristics of corporations, which we shall describe a little later. It must have at least one member who is liable without limit for all the partnership debts, and who is the manager of the business. With such general partner or partners, one or more special partners are associated, who take no part in the conduct of the business, and whose liability for firm debts is limited to the sum which each contributes to the firm's capital.

In a few States limited partnership associations are authorized by statute, which are almost like corporations. They do not have a general partner, and their creditors can look only to their capital and assets for payment.

**348. How limited partnerships are formed.**—We can not describe in detail the manner of organizing these partnerships. It is enough to say that the method prescribed by statute in the State or Territory where the partnership is formed must be carefully followed. If the proper papers are executed and are filed in the proper office, if the money or property which the special partner professes to contribute is actually turned over to the firm, and if the business is thereafter conducted in the way provided by the statute, the special partner will not be liable for firm debts beyond his contribution to the firm's capital. It is this last feature of limited partnership which has made it popular. Many a man is willing to risk a specific sum in a business which he has not the time or energy to manage, who would refuse to become a general partner in the business, with the indefinite hazard to his entire fortune which such a partnership would involve.

If the statutory requirements are not complied with, either upon the formation of a limited partnership or in the conduct of its business, the special partner will lose the statutory exemption from liability, and become liable as a general partner.

## PART III

## § 1. JOINT-STOCK COMPANIES

349. **Are partnerships with peculiar features.**—A joint-stock company is a partnership. Each member is liable for all the debts of the concern. But it differs from the ordinary partnership in two respects. Every partner is not an agent of the company, and the death of a partner does not dissolve the firm.

We have seen that one of the chief objects of the ordinary partnership is the union of the business skill, experience, and abilities of its members. These are considered quite as important as the money capital which they bring together. The joint-stock company, on the other hand, seeks first of all the aggregation of firm capital. In the next place, it seeks a form of association which shall have a continuous existence—which shall not be broken up by any partner's death, or by the sale of his share, or by his refusal "to play." Accordingly, when this form of partnership is organized, it is agreed that the capital shall be divided into a certain number of shares, each share being for a definite sum of money—ten, twenty-five, fifty, or one hundred dollars, as the case may be. It is further agreed that a partner may dispose of his shares at any time, and that the transferee may take his place as a stockholder in the firm. It is still further agreed that the management of the business shall be confided to a small number of persons, to be elected by the stockholders.

350. **Mining partnerships.**—These are organized, as a rule, on the joint-stock-company plan. In them, as in every other joint-stock association, the only partners who are agents for the firm are the managers. Every one dealing with them is bound to know that the managing partners



only have authority to buy and sell, to make contracts, or to do other acts on behalf of the firm.

**351. Statutory joint-stock companies.**—In many of our States the formation of these associations, the choice of managers, the names and powers of such officers, as well as the manner in which they may sue and be sued, are regulated by statutes. The tendency of this legislation is to make these companies more like corporations, and less like partnerships than they are at common law.

## PART IV

### § 1. CORPORATIONS

**352. An artificial or legal person.**—The ordinary business corporation—the only species of corporation with which we are now concerned—is organized by natural persons and exists for their benefit, but is quite distinct from them. In the words of Chief-Justice Marshall, when deciding the famous Dartmouth College case, it is “an artificial being, indivisible, intangible, and existing only in contemplation of law.” As a person it is a citizen of the State which has chartered it, and thus imparted to it the breath of life; it may take, hold, and transfer property; it may enter into contracts; it can commit torts or civil wrongs; it can even be guilty of criminal offenses for which it may be indicted and punished. Still more striking than any of the foregoing characteristics is its legal immortality—“Men may come and men may go,” but it goes “on forever.”

**353. How created.**—Blackstone tells us that the immediate creative act in the organization of corporations in England was usually performed by the king alone, in virtue of his royal prerogative—that is, the king gave to the corporation its charter. In this country corporations are cre-

ated by the legislative and not by the executive branch of government. At times they are chartered by special statutes, but as a rule they are organized under general laws.

Under these laws three or more persons (the minimum number being fixed by statute) who wish to form a corporation meet, decide upon the matters which are required by statute to be set forth in a certificate of incorporation, and have such certificate properly drawn up. They then sign and acknowledge it in a proper manner, have its form approved by a judicial officer, when such approval is required, and record it in the proper office, often that of the Secretary of State. This certificate usually describes the objects for which the corporation has been formed—for carrying on banking, or insurance, for operating a railroad or a ferry, or the like. It also states the name under which the corporation is to do business, the amount of its capital stock, how much of this has been paid in, and various other matters of fact. As soon as all the statutory requirements have been complied with the corporation is in existence, and may enter upon the prosecution of its business. In such cases, it will be noticed, the charter of the corporation consists not simply of its certificate, or articles of association, as that certificate is sometimes called, but, in addition to that, of the provisions of the statute by which the certificate was authorized.

**354. Liability of stockholders.**—The capital of a business corporation is divided into shares which are transferable by the shareholder. The following is an example of a certificate of such shares of stock:

Number C 155.

Shares 7.

#### AMERICAN WINDOW-GLASS COMPANY

This certifies that James Blank is the owner of seven shares of the Common Capital Stock of the American Window-Glass Company, a corporation of the State of Pennsylvania, of the par value of

One Hundred Dollars each. Transferable only on the books of the Company, in person or by attorney, on surrender of this certificate.

Witness the corporate Seal of said Company, and the signatures of the President and Treasurer, the third day of July, 1900.

J. A. CHAMBERS, *President*.

[SEAL] W. G. McCANDLESS, *Treasurer*.

Capital, \$17,000,000. Preferred Stock, \$4,000,000. Common Stock, \$13,000,000.

It will be observed that the stock represented by the foregoing certificate is common, while other stock of the corporation is preferred. The difference between the two is this: that an agreed rate of interest is to be paid out of the corporation earnings on the preferred stock before any dividends are payable on the common stock.

If the corporation has been duly organized and all the requirements of law are observed in its management, the stockholders have no liability for its debts. To be sure the money which they paid for their stock may be taken by creditors, for that is owned by the corporation; but in case the business proves unsuccessful, that is all the stockholders lose. They are under no personal obligation to creditors, as partners are. Such, at least, is the general rule.

**355. Transferability of stock.**—It will be noticed that certificates of stock are not ordinarily negotiable instruments. They are not made payable to order or to bearer, and they provide that the transfer shall not be deemed complete until it is entered upon the books of the company. Still, if the owner indorses them on the back, and delivers them to an agent with instructions to use them in a particular way, the agent will be able to give a perfect title to them to one who buys for value and with notice of the agent's limited authority.

At times all the stock of a corporation is owned by its officers, but in the case of our great railroad, telegraph, and

manufacturing corporations, the stock is owned by multitudes of persons scattered all over the country. It is constantly changing hands, and a large part of the business of the stock exchange in our large cities consists in real or fictitious sales of these stocks.

**356. The power of stockholders.**—While the artificial person, the corporation, owns the property and owes the debts, its conduct is determined by the stockholders. They are the power behind the throne. It is true that they do not hold frequent meetings, and that when they do gather they do not consider the details of business; but their will is supreme. Ordinarily they choose a board of directors, who select a president, a treasurer, and a secretary, and to these officials the stockholders commit all the details of management. Still, the lines of general policy are, or can be, marked out by the stockholders.

Even the stockholders, however, have no legal power to do acts not authorized by the charter of incorporation. Acts attempted by them or by officers outside the scope of charter authority, are said to be *ultra vires*—beyond their legal power. It is important, therefore, for persons dealing with a corporation to know the limits of its charter powers, and to see that all contracts with it are such as are clearly authorized. If they are unauthorized they are generally not enforceable against the corporation, or by it.

**357. Contracts by corporations.**—The old rule of the common law was that “a corporation being an invisible body could not manifest its intention by any personal act or oral discourse, and, therefore, could act and speak only by its common seal.” This rule proved to be very inconvenient, and has been eaten away by exceptions until little if anything of it remains. In this country a corporation makes contracts through its authorized agents, precisely as a natural person would, and is called upon to use its seal only when a natural person would need to use a seal.

Whenever a corporation enters into a written contract, or makes a conveyance of property, its name should appear in the body of the writing, and its name should be signed thereto. Following the signature of the corporate name should be the signature of the officer or agent who writes that name.

**358. Dissolution of corporations.**—A corporation may be dissolved in various ways. If it is chartered for a limited period, as for fifty years, it will be dissolved by the expiration of that period. In England Parliament may dissolve a corporation at any time, but in this country one of our State legislatures can not annul a corporation's charter unless it reserved the right to do so when it granted the charter. This is because the Federal Constitution provides that "no State shall . . . pass any . . . law impairing the obligation of contracts." (Article I, Section 10.) In the great case of *Dartmouth College against Woodward*, the Supreme Court of the United States decided, in 1819, that the charter of a private corporation is a contract between the State and the corporation, and, therefore, within the provision of the Constitution quoted above. Since that decision, it has been customary for the States to provide in their statutes, that corporation charters shall be granted subject to the right of the State to modify or annul them at pleasure.

Another method of dissolving a corporation is by a suit brought by the State for the forfeiture of the charter, because of some flagrant abuse of its franchise by the corporation. Still another is the voluntary surrender of its charter to the State.

## CHAPTER X

### PROPERTY—ITS ACQUISITION AND TRANSFER

#### § 1. NATURE AND FORMS OF PROPERTY

359. **Meaning of term.**—Property, in its broad, popular sense, includes whatever the law permits a person to own—that is, to possess, to enjoy and to dispose of, to the exclusion of every one else. Some things are excluded from private ownership. The air, the sea, the Great Lakes, running water, are the chief examples of this class. A person may have the right to enjoy them temporarily, but he can not acquire an exclusive ownership of them; he can not make them his private property. But these are exceptions to the general rule. Nearly everything in the material world may be owned by individuals.

360. **Real and personal property.**—Our law divides all objects of private ownership into real and personal property, a division which corresponds substantially with that of the Roman law into immovables and movables. The terms “real” and “personal” were not selected, however, as were the corresponding terms of the Roman law, as descriptive of the sort of things included in each class. They “were first applied to actions, and were afterward extended to property with the meanings which they had acquired in connection with actions.” A real action was one brought for the recovery of the *res*—the thing itself; while a personal action had for its object the recovery of damages from some person for the breach of a contract or other

obligation. During the twelfth century the rule was established that the only property for which a real action could be brought was property in lands. If the action related to any other form of property the defendant might relieve himself from liability by paying damages. From this time on the term real property or realty is employed to designate property in land, and personal property or personalty to designate every other kind of private property. The terms are still used in that way, although the reason for their original selection disappeared long ago. At present an owner can maintain a real action for the recovery of his horse which has been wrongfully taken from him as he can for his house.

361. **Two forms of realty.**—Real property assumes two forms, corporeal and incorporeal; or, in other words, ownership of the land itself, and ownership of the right to use the land of another for a particular purpose. Easements furnish the chief examples of incorporeal real property in this country. A right of way over the land of another—that is, a right to drive or walk, to pass and repass over it—is an easement in such land. So is a right to lay and maintain pipes in the land of another for the purpose of conducting gas, water, oil, or electricity across it.

Corporeal real property or land includes not only the soil and buildings thereon, but whatever is beneath the surface and above it. In the language of ancient authors it extends from the center of the earth to the highest heavens. It embraces mines, veins of gas or oil and the like below the surface, bodies of water on the surface, and the vacant space above the surface. If my neighbor shoots a bullet or sails a kite or passes a balloon through the air over my field he commits trespass precisely as though he drove a herd of cattle through that field. True, I would be very foolish to sue him for such a trifling interference with my right of property. So I would if I sued one who walked

across my pasture or my lawn without my permission. But in either case he has violated my right of real property. He also violates it if he strings telegraph or telephone wires over my lot, or builds a structure or plants a tree so that any part of it overhangs my soil.

**362. Two forms of personalty.**—Personal property is divided into things in possession and things in action, or tangible and intangible personalty. Of the first kind are goods, animals, and other material objects. Of the latter kind are debts and liabilities. The owner of a thing belonging to the first class has it in his possession and actual enjoyment, while the owner of a bill of exchange, or of any security for money, or of a contract right or an obligation of any sort, has only a right to obtain possession by means of a legal action.

**363. Realty may become personalty.**—Coal, or rock, or oil, or gas, or water in its natural state beneath the surface is realty. But as soon as it is detached from the earth, as a separate thing, it is transformed into personalty. So trees and other natural products of the soil are realty until they are severed from the land, while after severance they are personalty. Some crops are treated by our law as personal property for most purposes even before severance. Speaking generally, they are crops which are not of spontaneous growth, but result from special culture of the soil, and “which return the labor and expense bestowed upon them strictly within the year.” Corn, wheat, oats, potatoes, are examples of this class. Grass is not, for the growth of any one year is not due to the labor and seed of that year.

Even crops which are the result of yearly labor are not always treated as personal property. A sale of land upon which such crops are growing carries them as a part of the land. If the vendor would keep them from passing to the vendee he must expressly reserve them by a stipulation that they shall not go with the land.



**364. Personalty may become realty.**—It is a maxim of the common law that “whatever is applied to the soil belongs to the soil.” Accordingly, when bricks and stones and mortar and lumber and nails are worked into a permanent building they are a part of the real estate. It is so with gas, steam, or water pipes put into a building, and with any other article which is affixed to the realty, with a view to its becoming a permanent accession thereto. Such an article is known as a fixture. It has not lost its identity, but it has changed its legal character. It has ceased to be personalty and has become realty. A sale of a house and lot carries with it all fixtures, unless they are expressly reserved by the vendor.

It is to be borne in mind, however, that articles which the law regards as fixtures, as between the owner of the land and his transferee, are not always so regarded as between the landlord and tenant. If a tenant puts into a rented building machinery, or a furnace, or gas-fixtures, or shelving and counters, or similar things, for his use as tenant, they do not become a part of the realty as a rule. For the encouragement of trade the law regards them still as personalty, and permits the tenant to remove them at any time before his lease expires.

## § 2. METHODS OF ACQUIRING PROPERTY

**365. By one's own acts. (a) Occupancy.**—Property may be acquired by one's own acts in one of four ways, the first of which is occupancy. This is undoubtedly the most ancient method of acquiring ownership either of lands or of chattels. In our day, however, it is not a very important source of title. Indeed, it is scarcely possible in this country to become an owner of land by occupancy alone. According to our law, whatever land is not owned by natural or artificial persons belongs to the State or the nation, and

if one is to become owner of it he must acquire title to it through one or the other of those governments. If an owner abandons land, or dies without a will and without heirs, it reverts to the State. Title to personalty may be obtained by occupancy even now. Such is the title of the finder of abandoned chattels, or of those which have been lost and are not reclaimed. It is also the source of title which the hunter and the fisherman gains to his lawfully captured game and fish.

366. *(b) Title by prescription and possession.*—This differs from title by occupancy in that the latter vests as soon as the occupant takes possession, while title by prescription does not become complete until one has kept possession for a certain period. This period is generally fixed by statute, and a longer period is required in the case of land than of personal property. As a rule, title to land by prescription, as against the State, is acquired by forty years' uninterrupted possession under a claim of ownership. As against any one but the State it is acquired by such possession for twenty years. The legal theory underlying this form of title is that a grant or transfer of the land is to be presumed to one who has been allowed to retain possession of it as owner for the statutory period. Under statutes of limitations persons gain a perfect title to personal property by possession under a claim of ownership for periods varying as a rule from three to six years.

367. *(c) Title by natural increase.*—The products of one's land, the offspring of one's animals, the milk from one's cows, and the wool from one's sheep are examples of property acquired by this method.

368. *(d) Title by one's labor.*—Intellectual productions of every sort furnish examples of acquisition by one's labor. It is true, the author of such productions can make his title to them secure only by complying with certain statutes. If he has written a book, or invented a machine, he may

keep others from enjoying them by retaining them in his exclusive possession. But the moment he makes them public they become common property, unless he has secured a copyright of the one or letters patent for the other.

In this country letters patent are issued by the United States Patent Office, and secure to the inventor for the period of seventeen years "the exclusive right to make, use, and vend the invention throughout the United States and its territories." The United States statutes provide for the copyrighting of almost every sort of literary production—of books, maps, charts, dramatic or musical compositions, paintings, engravings, and so on. A copyright secures to the author the exclusive right to multiply copies of his production for a period of twenty-eight years, with a possibility of renewal for fourteen years more. Recent statutes in this country and in some European states provide for international copyright. Under this legislation, an American author can copyright his books in England and an English author can copyright his books here.

**369. Property acquired upon another's death. (a) By will.**—The law permits an owner to transmit his property to others upon his death, though it does not give him absolute liberty of disposition. In certain cases he is not allowed to devise or bequeath to corporations all of his property; and, generally, he is prohibited from tying up his property, or limiting, beyond a fixed period, the power of the one to whom he gives it, to dispose of it as he sees fit.

The instrument by which a person disposes of his property upon his death is usually called his last will and testament. Anciently the term "will" was confined to realty, and "testament" to personalty. By the former instrument the testator was said to "devise" his lands, while by the latter he was said to "bequeath" his personal property or chattels. This distinction is not insisted upon at present.

**370. Who may make a will.**—The general rule is that any person of sound mind and of full age may dispose of his property by will. Formerly married women could not make a valid will, but modern legislation in most of our States has abolished her legal incapacity, and has enabled her to make a will as though she were unmarried. Wills of personal property may be made by persons under legal age. In many of our States males are authorized to make such wills at the age of eighteen, and females at sixteen.

**371. The formalities of a valid will.**—These were introduced into English law by the statute of frauds, which was described in the chapter on Contracts. Before that act was passed a valid will could be made orally. Now, with an exception, presently to be mentioned, it must be in writing, and that written expression of the owner's last will must be properly executed, published, and attested. The prescribed execution generally consists in the testator's subscription of the instrument—that is, in his writing his name or making his mark underneath the body of the will. Publication consists in the testator's declaration to those who are to sign as witnesses, that the instrument executed by him is his last will and testament. The attestation, or witnessing, consists in two or more persons signing their names at the end of the will at the testator's request. These witnesses must have seen the testator sign the will, or he must have acknowledged to them that the signature was his, and they must sign in the testator's presence.

**372. Nuncupative wills.**—Unwritten, or as they are often called, nuncupative wills, are generally limited to sailors and soldiers while in actual service and danger, and when they have not the time or opportunity to make a written will.

**373. (b) Upon intestacy.**—If an owner dies without leaving a will—that is, intestate—the law designates the persons to whom it shall go. These differ, according as the

property is real or personal. Real property “descends to the heirs,” while personal property is “distributed by the administrator among the next of kin” of the deceased. At times the “heirs” and the “next of kin” are the same persons, but this is not always the case; and the statutes in each State must be examined in order to determine who are heirs and who are next of kin, as well as the shares which such persons are entitled to in the property of their intestate.

It should be stated that as soon as a person dies without a will, his real estate vests in his heirs—they become its owners at the very moment of his death. Not so in the case of personalty. The title to that does not pass at once and directly to the next of kin. An administrator must be appointed by the proper officer or court—the surrogate in some States, in others the probate court, or the orphans’ court, or a similar tribunal—who takes title to the personalty, settles the affairs of the intestate, collects debts due to him, pays debts owing by him, including the funeral expenses, and distributes the balance under an order of the surrogate or of the proper court among the next of kin.

**374. Acquiring property from a living owner. (a)**  
**With his express consent.**—A person may become the owner of property by gift from another. In order that a donee’s title be perfect, the gift or donation must be absolute or complete. If I own the promissory note or check of A, and hand it over to B as a gift, his title to it is perfect, and I can not recover it. If I hand to B my promissory note or check for the same amount as a gift he does not get title to the money named in the paper. I have simply promised to give him the money, and if I repent of my generosity and refuse to keep my promise, or if I die before the promise is performed, he takes nothing. Even if I have completed the gift my creditors may compel the donee to surrender it, if I have not sufficient property without it to pay the

debts I was owing when the gift was made. I have no legal right to be generous at the expense of my creditors.

Other examples of obtaining property by the consent of the former owner are afforded by conveyances of land, which will be described in the next section, and by sales of personalty, which will be dealt with in the next chapter.

375. (b) **With the implied consent of former owner.**—An example of title acquired in this way is that obtained by the husband or the wife in the other's property upon their marriage. By the common law the husband took the lion's share. Still, under the theory of that law, he took it with her implied consent. He became entitled to the rents and profits of her lands during their joint lives, and, if a child was born, to the use of such lands during his life. This latter right was called "tenancy by courtesy." He became the absolute owner of her personal property in possession, and had the right to reduce to possession all her choses or things in action. On the other hand, she acquired an interest in his lands, although an interest much less than his interest in hers.

Statutes have taken from the husband most of his rights of ownership in the property of the wife. As a rule, in this country, marriage does not give to him any right to take her personal property without her actual consent, and she may defeat his tenancy by courtesy in her real property by conveyance or by will.

Her common-law interest in his real estate is still preserved, and in some States has been increased by statute. That interest was known as "dower"—a right, upon the death of her husband, to the possession and use of the third part of all the lands owned by him during their marriage. A wife can not be deprived of her dower without her consent unless she is guilty of gross marital infidelity, or unless her husband's title is swept away by an ownership superior to his. For example, if a husband buys land subject to a

mortgage, and that mortgage is foreclosed and the land sold to satisfy it, the husband's title is lost and the wife's dower is lost too.

**376. Title from living owner without his consent.**—The chief examples of this class are titles derived under judgment and execution against the former owner, and under a decree in bankruptcy. When a judgment for a sum of money is obtained by A against B, the former is entitled to have an execution issued to a sheriff or like officer, directing him to seize and sell enough of B's property to satisfy the judgment and the sheriff's expenses. As a rule, personal property, if there is any, must be taken and sold first; but when this is exhausted, real property may be levied upon and sold until the judgment and expenses are paid in full.

In the chapter on Bankruptcy we saw that when one is judicially declared a bankrupt, all his property passes to his assignee or trustee, who becomes legal owner of it, and whose duty it is to convert it into cash in order that he may pay the expenses of the bankruptcy proceeding, and distribute the balance among the bankrupt's creditors.

### § 3. CONVEYANCE OF REAL PROPERTY

**377. Real property is transferred by a written conveyance.**—By the English statute of frauds, to which frequent reference has been made, a conveyance of an estate or interest in land (except leases for three years or less) is required to be in writing and signed by the party undertaking to convey the same. As a general rule this conveyance must also be under seal, although such seal in some of our States may consist in a mere flourish of the pen, as was pointed out in the chapter on Contracts.

**378. Various kinds of deeds.** (a) **Quit-claim deed.**—While deeds, or written and sealed conveyances of land, are of various kinds, we shall describe only the two which are

most frequently used—the quit-claim deed and the warranty deed. By the former the grantor professes to convey only such title as he holds to the land described in the deed. The grantee takes the property subject to any defects which may exist in the title, and has no right to recover any of the price he has paid, though it turns out that his title is good for nothing. The following is a short form of the quit-claim deed authorized by the statutes of Indiana :

I, John Smith, of Marion County, Indiana, quit-claim unto James Jackson, of Harrison County, Indiana, the following described premises [then should follow a full and accurate description of the land] for the sum of one thousand dollars.

In Witness Whereof, I have hereunto set my hand and seal this first day of March, 1902.

JOHN SMITH. [SEAL]

379. (b) **Warranty deed.**—By this instrument, the grantor not only undertakes to convey title to the premises described therein, but to warrant and defend the grantee against all lawful claims to the property. According to the Indiana statutes, the deed set forth in the last paragraph can be converted into a full warranty deed, by substituting the words “convey and warrant” for the word quit-claim. In most States, however, a warranty deed declares that the party of the first part grants, bargains, sells, conveys, and confirms unto the party of the second part, and to his heirs and assigns forever the described premises; and the party of the first part (the grantor) binds himself, his heirs, executors, and administrators to warrant and forever defend the said premises in the quiet and peaceable possession of the party of the second part (the grantee), his heirs and assigns, against the said party of the first part, and against all and every person and persons whatsoever lawfully claiming the same.

380. **Mortgages of land.**—The owner of land often wishes to borrow money and give security therefor on the



property. This he does by giving a mortgage on it. Such an instrument is in writing and signed and sealed by the mortgagor. It is in form a conveyance of the land to the mortgagee, but it contains a provision that it shall be void and of no effect if the mortgagor pays the money at the time stipulated in the mortgage. Even though the mortgagor fails to pay as agreed, the mortgagee does not thereby become the absolute owner of the mortgaged premises as he would under a quit-claim or warranty deed. The mortgagor still has the right to redeem the land by paying the money and interest. In order to cut off this right of redemption the mortgagee must foreclose the mortgage and sell the land. If upon such sale it brings more than enough to pay the mortgage debt and the expenses of foreclosure and sale, the surplus must be paid over to the mortgagor.

**381. Wives should sign deeds and mortgages.**—As a wife is entitled to dower in her husband's lands, she must join with him in signing and acknowledging a deed or mortgage, in order that he may give a perfect title to the land. It is in this way that the wife usually assents to the surrender of her right of dower, although she may so assent by a separate instrument, known as a release of dower.

**382. Recording of conveyances of land.**—As soon as the grantee of real estate obtains a deed or mortgage of it, he should have it recorded in the proper office, generally the office of the county clerk or of the register of deeds. In order to entitle it to record, the conveyance must be acknowledged by the grantor before a proper officer—a notary public, a commissioner of deeds, or the like. As soon as it is entered in the office for record it is notice to everybody that the grantee or mortgagee named therein has the title to, or lien upon, the premises. Until the conveyance is recorded it is possible for the grantor or mortgagor to deed or mortgage the land to another party, and thus defeat the title or lien of the first grantee or mortgagee.

383. **Abstract of title.**—Upon the sale of real estate it is customary for the vendor to furnish an “abstract of title,” or, as it is sometimes called, a “search,” showing the true condition of the title. This is a brief statement of the various conveyances of the premises described in the deed which have been recorded, and of the judgments or other liens upon the premises. It is ordinarily made by the county clerk or register of deeds for the county, in which the land is situated, or by some expert abstractor or searcher of titles. In some parts of the country there are large corporations whose chief business it is to search titles and guarantee their validity.

## CHAPTER XI

### SALES OF PERSONAL PROPERTY

#### § 1. NATURE AND FORMALITIES OF A SALE

384. **Growing importance of this topic.**—In the last chapter we saw that the early common law did not deem personal property of enough importance to give to its owner a real action for its recovery. At that time land formed the great bulk of the world's wealth. A man's social and political rank was determined chiefly by the extent and value of his land holdings. A feudal lord was great or insignificant, according to the number of his acres and of his tenants. With the growth of commerce, however, the relative importance of real and personal property has undergone a change. According to the census of 1890, the value of the real property in this country, including buildings and other improvements thereon, was a little over thirty-nine billion dollars, while the value of personal property was nearly twenty-six billion dollars. Not only have the forms of personal property multiplied rapidly in modern times, and its total value grown enormously, but the business transactions in such property are stupendous in number and importance. The value of our exports for the year 1900 was nearly a billion and a half, while our imports were valued at nearly a billion dollars. Our farm-crops for that year exceeded two billion dollars, and our manufactured articles sold for more than ten billions. During the year 1897 the foreign commerce of the world—that is, the trade

between nations—reached a total of twenty billion dollars. The domestic commerce of the various nations must have amounted to many times that sum. In other words, the sales of personal property throughout the world reach the enormous figures of fully two hundred billion dollars annually.

**385. Definition of sale.**—A sale of personal property is the transfer of its general ownership from one person to another for a price in money. It is almost always the result of a contract between the seller and the buyer. If the contract provides for the transfer of ownership at once the transaction is called “a present sale,” or “a bargain and sale,” or “an executed contract of sale.” If it provides for the transfer of ownership at some future time it is called “a contract to sell,” or “an executory contract of sale.” Viewed as a contract, a sale transaction is subject to the principles of law set forth in the chapter on Contracts, and those need not be repeated in this connection. In this chapter we shall be concerned chiefly with the application of those principles and with other legal rules which are peculiar to sales of personal property.

**386. Distinction between sale and similar transactions.**—The business transaction most nearly resembling a sale is that of barter, or the transfer of one article of personal property for another, as when A and B trade horses, or wagons, or oats, or cows. It differs from a sale only in this, that the consideration for each transfer is the counter-transfer of a chattel instead of money. Next to barter in its likeness to sale is a mortgage of personal property, usually called a chattel mortgage. This, in form, is a sale, but it contains a proviso that if the mortgagor pays a certain amount of money, or does some other act, at a stipulated time, the sale shall be void. Even though the mortgagor does not perform the promised act at the agreed time, he still has the right to redeem the property from the mort-

gage by paying his debt with interest. In other words, a chattel mortgage does not transfer general ownership, or absolute property in the chattels, while a sale does.

A sale differs from a bailment, as we saw in the chapter on Bailments. The former is the transfer of title to goods, the latter of their possession. A bailee undertakes to restore to the bailor the very thing bailed, although it may be in a changed form, while the buyer is to pay money to the seller for the subject-matter of their contract.

**387. Quasi-sale.**—Although a sale, in the proper sense of the term, involves a contract, a quasi-sale, a “sort of sale,” may take place without a contract. If X takes my horse and converts it to his own use I may sue him for the wrong which he has done me. In case I obtain a judgment against him for the value of the horse, and he pays the judgment, the law confirms his title to the horse; it treats him as though he had bought it at the time when he wrongfully took it. But he does not get the title unless he pays the judgment.

**388. Formalities of the sale contract.**—Unless a sale contract comes within the provisions of the statute of frauds no formalities are required. It may be in writing or by word of mouth; the price may be paid or its payment may be promised for a future day; the goods may be delivered to the buyer or remain with the seller. In either case, if the minds of the parties have met upon the proposition to sell and to buy certain property for a money price, there is a valid contract of sale. Unfortunately (as the writer thinks) the statute of frauds embraces most sale transactions. If the price or value of the article contracted for amounts to or exceeds a certain sum—ten pounds in England, thirty to three hundred dollars in the various States of this country—a contract of sale, to be enforceable under this statute, must be evidenced by a memorandum in writing signed by the party to be charged, or by a part

payment of the price, or by an acceptance and receipt of a part of the goods by the buyer.

It will be observed that the statute does not render the sale void if its formalities are not observed. It only enables the party who is sued for breach of the contract to defend the action successfully, provided he sets up the lack of compliance with the statute as a defense.

**389. What contracts are within the statute?**—This question has given rise to much litigation, and courts have differed widely in answering it. Upon principle the answer would seem to be that the statute includes every contract which has for its final object the transfer of title to personal property from one person to another. Such is the approved answer in England. Hence, a contract by a dentist to supply another with a set of false teeth for a price exceeding ten pounds was held to be within the statute. The buyer died before the teeth were finished, and her executor refused to take and pay for them. As the deceased had not signed a written memorandum of the contract, or paid any part of the price, or accepted and received any part of the set of teeth, the dentist was beaten in his action for the contract price.

Missouri, and perhaps one or two other States have accepted the English view ; but most of our courts have rejected it, although they are not agreed as to the rule which should take its place. The two rules which prevail most widely in this country are known as the New York rule and the Massachusetts rule, because they were first established in those States. According to the New York rule the thing contracted for must be in existence and susceptible of delivery under its contract name at the time the contract is made, or the statute will not apply. Under this rule a contract of a dentist to make a set of false teeth, or of a manufacturer to supply any product of his establishment, is outside the statute, and is binding ; while a contract to supply

in the future an article which is in existence at the making of the contract is within the statute, and not enforceable unless there has been part payment of the price, or part acceptance and receipt, or a written memorandum.

The Massachusetts rule has been stated by a learned judge of that State as follows: "A contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But, on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute." Under this rule a contract for the sale of a wagon, thereafter to be manufactured by the seller, will be within the statute if it is to be made like those which he habitually makes for the market, while if it is to differ in any respect from those—in the color of the paint, in the width of the stripes, in the texture or appearance of the lining or the like—it is outside the statute.

390. **The memorandum.**—The statute does not require a full and formal written contract. All that it calls for is a memorandum in writing of the oral agreement which the parties have made. It assumes that they are busy men and have but a moment for jotting down this memorandum. It may be written in ink or with a lead-pencil. It may be partly printed and partly written. Abbreviations may be used instead of full words or phrases; and, under the English statute as well as in most of our States, the signature may be in any part of the memorandum. In New York, the signature must be subscribed or written underneath the body of the memorandum. It is not necessary that both parties sign. The statute calls for the signature of the party to be charged—that is, the one against whom a claim is made under the contract—and it permits this

signature to be made by any duly authorized agent of such party.

While the memorandum need not be formal, it ought to contain all the terms of the oral agreement. It should state the names of the parties, or identify them; it should also describe or identify the thing contracted for, and if a price has been agreed upon it must specify that.

391. **Part payment.**—Even though a written memorandum has not been made, the contract will be enforceable by either party, if the buyer has paid a part of the purchase price. In the English statute, the giving of something in earnest to bind the bargain is provided for, and similar language is used in some of our State statutes; but according to the prevailing view in this country “earnest” and “part payment” are the same thing. In New York and a few other States the part payment must take place at the time of making the contract. This requirement, however, is peculiar. The general rule is that it may be made at any time before suit is brought upon the contract. It is not necessary that money be used. A part payment may be made by check, by property, or by services if the parties so agree.

But the mere tender, even of money, will not satisfy the statute. In a leading case on this point, a party had orally contracted to sell a quantity of cheese to another and called on the purchaser to make a part payment to bind the bargain. The latter tendered the money, whereupon the seller refused to receive it, and the court held that he had the power thus to defeat compliance with the statute by the buyer. The case is a good illustration of the temptation which the statute holds out to a man to break his word. The price of cheese had gone up, and the seller could make money by breaking his promise and selling to another. The statute enabled him to do this with impunity.

392. **Acceptance and receipt.**—Still a third way of satisfying the statute is by the buyer accepting and receiving a



part of the property contracted for. This language of the statute has given rise to a vast amount of litigation, and many of the decisions upon this point are very unsatisfactory. In this country, it is generally held that an act of acceptance under the statute is such an act as precludes the buyer from thereafter rejecting the part accepted—an act of distinct and final approval of it as being in accordance with the contract.

Receipt by the buyer is the correlative of delivery by the seller. A buyer receives property when he or his authorized agent takes control of it as owner with the consent of the seller. A common carrier, who is authorized to transport the property from the seller to the buyer, is agent of the latter to receive but not to accept it under this statute.

An acceptance and receipt of any part of property contracted for satisfies the statute as to all of it. Such acceptance and receipt, however, does not cut the buyer off from his right to reject the remainder of the property when it is tendered to him if it does not conform to the contract. For example, A contracts for a car-load of lumber of specified kind and quality for three hundred dollars. A wagon-load of it is brought to his premises. He examines it and tells the driver to unload it. Afterward he notifies the seller he will not take any more. The seller can maintain an action against him on the oral contract for the price of the whole, notwithstanding there was no memorandum in writing and no part payment, provided he can show that all of the lumber conformed to the contract. On the other hand, the buyer has the right to reject any part of the lumber that does not conform to the contract.

## § 2. WHEN TITLE PASSES

**393. In case of bargain and sale.**—When the transaction is one of “bargain and sale,” or, as it is also called, “a

present sale," or "an executed contract of sale," title passes as soon as the contract is made. A offers his horse to B for two hundred dollars, and B accepts the offer. It is a bargain and sale. The moment B accepts the offer he becomes owner of the horse, and A is entitled to receive at once two hundred dollars. Had A's offer been: "I will sell you my horse now for two hundred dollars, and give you a month in which to pay for him," and B had accepted the offer, the transaction would still have been a bargain and sale, although a sale on credit. B would have become the owner of the horse, but A would not be entitled to his money for a month.

394. **The doctrine of potential existence.**—Ordinarily a present sale can be made only of property which is in actual existence. That is the invariable rule in England at present. In this country, however, most courts have adopted the doctrine of an old English case, decided in 1603, to the effect that things which are the natural product or expected increase of something already owned by the seller, are to be treated as having a potential existence, and, hence, as proper subjects of a present sale. Accordingly, a person may make a present sale of the future offspring of his animals; or of products from them, as milk, or butter, or eggs, or wool; or of the future crops of his land. After making such a contract no further act is necessary by either seller or buyer to pass title from the former to the latter. As soon as the thing comes into actual existence the buyer's title and right to possession are perfect.

395. **In case of an agreement to sell,** title never passes at the time the contract is made. At what time in the future it is to pass from the seller to the buyer depends upon two considerations: First, the nature of the thing contracted for; second, the intention of the parties to the contract.

The first consideration can be disposed of very quickly.

If the thing contracted for is not in existence (actually or potentially) it is clear that title can not pass until it comes into existence. For example, L borrows money from P and gives him a writing, that he thereby sells, assigns, and sets over to P all the halibut that he and his crew may catch on their next voyage. Although the language of the agreement is that of a present sale it can not take effect as such, for the halibut are not yet caught.

**396. The intention of the parties. (a) If expressed.**—Assuming that the subject of the contract is in existence, or that it comes into existence before the time named by the parties for title to pass, it is well settled that title will pass at the time agreed upon and not before. The commonest example of this sort of transaction is the “conditional sale.” Sewing-machines, pianos, and various other articles are sold upon the express condition that title is not to pass to the purchaser until they are paid for. In the absence of a statute on the subject the common law gives full effect to this contract; enables the seller to keep the title, and prevents the buyer from passing the title to anybody else until the entire price is paid. In some States, however, legislation requires such a contract to be reduced to writing, and filed in the office of the town clerk or similar official, in order to prevent the buyer from passing title to his creditors or to *bona fide* purchasers.

**397. (b) Intention implied from conduct.**—Very often, indeed, in the great majority of cases, the parties to a sale contract do not state in express terms their intention as to the time when title is to pass. If a lawsuit arises from such a transaction it becomes necessary for a court to decide what the implied intention of the parties was. To enable it to do this satisfactorily certain rules have been adopted. It should be borne in mind that these rules are applied only when the parties have failed to express their intention.

**398. Rule First. A present sale of existing goods is presumed.**—When the articles contracted for are in existence, and ready to be handed over in accordance with the contract, the law presumes the parties to intend an immediate transfer of title. If A says to B, “I will give two hundred dollars for your horse and will pay you within a week,” and B accepts the offer, the law presumes a present sale. The title passes at once to B, and, though the horse may be killed by a stroke of lightning before B can take him from A’s pasture, B must pay for him, because the loss from the accidental destruction of personal property falls upon the owner.

**399. Rule Second. When goods are not in deliverable condition.**—Although the articles are in existence when the sale contract is made, if the seller is to do anything to them before he can call on the buyer to accept them as corresponding to the agreement, the law presumes that title is not to pass until that is done. In a leading New Jersey case, a party contracted for the sale of a lot of corn, which he was to shell before it was delivered. The court held that the intention of the parties to be implied from their contract, was that title should not pass until the seller had shelled the corn, and thereby put it into the condition called for by the contract.

**400. Rule Third. Sale on approval.**—Oftentimes a contract of sale provides that the buyer may have a certain time for the trial of the article sold. In such cases the law presumes that title is not to pass until the trial has been made and the article approved by the buyer. His approval may be established either by his admission that the article is satisfactory or by his use of the property as his own.

A contract of “sale or return” is treated in England as a sale on approval. In this country, however, such a contract—that is, a contract of sale with the privilege on the part of the buyer to return the property within a given time,

if he wishes to—passes title to the buyer, but gives him the right to pass it back to the seller. So long as title remains in the buyer he must bear the loss if the property is accidentally destroyed. In case of a sale on approval, the loss would fall on the seller, if it occurred before the article had been approved by the buyer.

**401. Rule Fourth. Subsequent appropriation of the goods to the contract.**—The foregoing rules, it will be observed, apply chiefly to things which are in existence when the contract is made. We now pass to the rule applicable to contracts for the sale of future or unascertained goods—that is, of goods which can not be specified or set aside at the time of the contract, but which are to come into existence, or to be appropriated to the contract at a future day. For example, a manufacturer agrees to make and ship certain goods within a specified period, or a dealer takes an order for goods which he is to purchase from others and apply to the contract.

In such a case, the law presumes title to pass as soon as the agreed articles have been unconditionally appropriated to the contract by either party, with the assent of the other. This rule, it will be noticed, involves three elements. If either is lacking title will not be presumed to pass. First, the goods must be such as the contract calls for. If the contract is for No. 1 wheat the seller does not perform the contract by offering No. 2 wheat, and an unconditional appropriation of such wheat will not pass title to the buyer.

Second, the appropriation must be unconditional. If the seller ships No. 1 wheat to the buyer, and takes a bill of lading from the common carrier, which states that the wheat is to be delivered to the seller or his assigns, he thereby keeps the title in himself. The wheat is appropriated to the contract conditionally, the condition being that the buyer shall pay for it before getting title.

Third, both parties must assent to the unconditional appropriation of the agreed articles. It is true this assent by one may precede the appropriation by the other. Such is the case where the buyer orders the seller to ship goods from a distance. By this order the buyer gives his implied assent in advance to the seller's appropriation of the goods, provided they conform to the contract.

402. **A seller who has not title can not give title.**—This is the general rule of the common law. In England three exceptions to it are recognized. The first is that of sales in market overt,<sup>1</sup> to persons who buy in good faith, without notice of any defect in the seller's title. This exception does not obtain in this country, as a market overt has never existed here. Accordingly, if A buys a horse in a public market, or at a private sale, from one who is not its owner and one who has neither actual nor apparent authority from the owner to sell it, he gets no title. The true owner may take it from him, and A must look to the seller for redress.

The second exception to the general rule above stated relates to sales of negotiable paper. It prevails in this country as well as in England. As we dealt with it quite fully in the chapter on Negotiable Paper, we do not need to explain it here.

403. **Factors acts.**—The third exception has been created by statutes known as factors acts. In England those statutes enable mercantile agents who, with the consent of the owner, are in possession of goods, or of the documents of title to goods, to sell, pledge, or otherwise dispose of them in the ordinary course of their business, even in violation

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<sup>1</sup> A market overt in England is a market held at stated intervals and in a particular place, by virtue of a charter from the Crown or of prescription. It does not include the whole town where the market is held, but only the market-place. In London, however, every shop in which goods are exposed publicly for sale is a market overt for such things as the owner professes to trade in.

of their instructions from the owner, and in excess of their authority as agents. In this country, factors acts have been passed in but a few States, and they have but slightly modified the common-law rule that a seller can not give title to personal property unless he is its owner or that owner's agent.

### § 3. DUTIES OF THE SELLER

**404. These are threefold.**—If we recall the definition of a sale, as a transfer of the general ownership of certain personal property from one person to another for a price in money, we will see that the duties of the seller are threefold: First, to transfer title to the buyer. Second, to furnish the agreed thing. Third, to give possession of it to the buyer.

**405. To confer title on the buyer.**—This duty would seem to be unquestionable. And yet it was long a matter of doubt in England. It was thought by many eminent lawyers there that the buyer of personal property took the risk of title on himself, unless the seller expressly warranted his ownership. In this country, however, the courts have always held that the seller of personal property which is in his possession, by the very act of sale and without any express words on the subject, promises that he has title and that he will confer it upon the buyer. Such, too, is the present rule in England.

Of course, if the seller offers not the full ownership of the goods, but only such interest as he has in them, the implied promise as to title will be negatived, and the buyer will get such title as the seller had and no more. Of this class are sales by an assignee in bankruptcy, by an administrator or executor, by a constable or sheriff, of goods which have come into his hands in his official capacity. It is understood that he makes no personal promise as to title; that he sells only such interest as came to him.

**406. To furnish the agreed thing.**—All authorities concur that this duty exists; the only differences of opinion relate to its extent. We shall not undertake to point out and discuss those differences in detail, but to state the views which generally prevail in this country.

If two persons contract for the sale and purchase of a particular thing, which the buyer has full opportunity to examine, the seller performs his duty when he delivers that thing to the buyer. It may be that it is not of the quality or condition which the buyer thought it was, but if the seller does nothing to mislead or defraud him the buyer must take the thing for better or for worse. The rule in such a case is expressed by the common-law maxim *caveat emptor*—let the buyer beware.

**407. Sale by description.**—Such a sale as was referred to in the last paragraph is known as a sale upon inspection. A sale by description is a very different affair, and is governed by a different rule. Suppose A orders from B a horse, well broken and safe, and fit for a lady to drive, and B furnishes a horse pursuant to the order for which A pays B's price. Here A does not examine and pass judgment on the animal, but relies on B's skill and judgment to supply the sort of horse described in the order. B does not perform his contract by furnishing a horse that fails to comply with the description. A can reject the horse and recover the price which he paid. This class of cases is very extensive, embracing substantially every sale transaction, where the buyer has no opportunity to inspect the thing bought and where he has a right to rely and does rely upon the seller's description, as a statement of the quality or condition of the thing bargained for.

**408. The goods must be merchantable.**—Whenever the sale of goods is one by description the seller is bound to supply goods which are salable in the market under that description; in other words, goods that are merchantable.



In the language of an English chief justice, when deciding a case nearly a hundred years ago: "The purchaser has a right to expect a salable article answering the description in the contract. He can not, without a warranty, insist that it shall be of any particular quality or fineness; but the intention of both parties must be taken to be that it shall be salable in the market. The purchaser can not be supposed to buy goods to lay them on a dunghill."

A person, who agrees to sell sugar, does not perform his contract by supplying sugar so adulterated as not to be merchantable as sugar. In a modern Massachusetts case it was held that four per cent of sand in a quantity of sugar did not render it unmerchantable. Whether an article is merchantable or not is generally a question of fact for the jury to decide.

**409. Fit for particular purpose.**—Whenever the buyer informs the seller that he wants the article for a particular purpose, and that he relies on the seller's skill and judgment in filling the order, it is the duty of the seller to supply an article thus fit for the purpose. For example, A orders a quantity of cloth to be made up into servants' liveries. The seller supplies cloth which is unfit for that use, owing to a defect arising from a particular mode of manufacture. He has broken his contract, and is liable to the buyer for such damages as that breach has caused. Again, a manufacturer of windmills accepts an order for a windmill to be set up at a particular place on the buyer's farm. He is bound to supply a windmill that is fit for use at that place. If he puts up one that will not work there, although it might work somewhere else, the buyer is not bound to pay for it, but on the other hand has a right to damages against the seller.

**410. Duty to give possession.**—Not only must the seller confer title on the buyer and furnish the very thing agreed upon, but he is bound to give possession of the thing to the

buyer. The only exception to this rule exists when the parties agree that the buyer is to run his own risk of getting possession—as when the owner of a sunken vessel sells it to one who takes his chances of raising it, or the owner of a lost animal sells it to one who takes the risk of finding it.

This duty of giving possession, however, is a conditional one, unless the parties do away with the condition by agreement. It is conditioned upon the buyer's paying the price. If A offers his horse to B for two hundred dollars, and B accepts the offer, title passes at once, as we have seen, and A is bound to give possession of the horse to B. But B is bound on his part to pay the price, as a condition of taking possession, unless the sale is on credit, or A has in some other way agreed to give up the condition.

**411. Where possession is to be given.**—If a place for the delivery of the article is not specially agreed upon, the law declares that, in case of a present sale, possession is to be given at the place where the article is at the time of sale. In case of an agreement to sell in the future, the legal place of giving possession, in the absence of an agreement to the contrary, is the seller's residence or his place of business. If the seller is engaged in business, and the article is one which he deals in at his place of business, delivery is to be made there; otherwise at his residence.

**412. Express warranties.**—The obligations of the seller, which we have thus far discussed, are, as a rule, implied from the circumstances of the sale. They are often called implied warranties to distinguish them from express warranties, which we are now about to consider.

The term "warranty," however, is not a very happy term to apply to one of those implied promises or engagements of the seller. In order to avoid confusion, "warranty" ought to be limited to an agreement, which is added to the sale contract, but is not one of the terms of that

contract. On that account we have refrained from calling any of these implied engagements of the seller warranties. The following is an example of an express warranty, using the term in its narrow, and, as we think, its only proper sense: A offers his horse to B for two hundred dollars. B answers, "I will take him at that price if you will warrant that he is sound." A replies, "I warrant him sound," or "He is as sound as a dollar," or "He is as sound as any horse in the world." Here is a sale of the horse with an express warranty added. By the contract of sale title passes to B and he is bound to pay the price. By the collateral or additional agreement of warranty A is bound to pay B damages if the horse is not sound.

The word warrant need not be used in order to have an express warranty. Any positive statement of fact by the seller as to the nature, quality, or condition of the thing which he offers for sale, inducing the other party to buy, is generally to be regarded as a warranty.

#### § 4. DUTIES OF BUYERS

**413. To take title to the goods.**—The first duty of the buyer is to take title to the thing which he has agreed to buy. If the transaction is a bargain and sale the title passes to the buyer the moment the bargain is struck, and he can not throw it back upon the seller without his assent. From that moment the risk of loss is on the buyer. Although the property may be destroyed or may fall in value, he must pay the agreed price.

But suppose the transaction is a contract to sell. Can the seller force title upon the buyer by tendering the agreed article? In England and in many of our States he can not. Even though the seller tenders the very thing which the contract calls for, and tenders it at the stipulated time and place, the buyer can prevent title passing to him by

refusing to accept it. Of course such a refusal is a breach of his contract, and the seller is entitled to recover damages for that breach. But that is his only right. The title to the property is still in him, and he must take care of the property and dispose of it as best he can. In some of our States the seller may, in certain cases, force title upon the buyer by tendering the agreed article at the proper time and place.

**414. To take possession.**—Not only is the buyer bound by his contract to take title, but it is his duty to take possession of what he has bought. If no time is stipulated in the contract, it is his duty to take possession within a reasonable time after title has passed to him. In case he does not he becomes liable to the seller for a reasonable charge for its care and custody, and also for any damage occasioned to the seller by his neglect to take the property away.

**415. To pay for the property.**—The third duty of the buyer is to pay for what he buys. When the price is agreed upon he is bound to pay that sum. If no price is named the law declares that he must pay a fair and reasonable price. If the goods are salable in the general market, such as grain, or fruit, or other articles of ordinary merchandise, he must pay their market price. When the goods have not a market price, or when the market price has been unfairly raised or lowered by a “trust” combination, or by speculators who have “cornered” the market, the buyer discharges his duty by paying what the goods were fairly worth.

## § 5. REMEDIES OF THE SELLER

**416. The seller's remedy by action for the price or for damages.**—After the title has passed to the buyer, if he fails to pay for the goods when he ought to pay, the seller is entitled to sue him for the price. If the buyer improperly refuses to accept the goods when they are tendered, and thus

to take title, the seller may sue him for the damages caused by this refusal. Such damages are, ordinarily, the difference between the contract price and the market price at the time and place of delivery under the contract. If the goods are not such as are sold in the general market the damages are the difference between the contract price and their reasonable value at the stipulated time and place. For example, A contracts to sell his growing crop of hops and deliver it to B in New York, October 1st following, at twenty cents a pound. Hops fall in price, and on October 1st the market rate in New York is twelve cents a pound. B refuses to take the hops, thus breaking his contract. A is entitled to recover from B eight cents a pound as damages. B having refused to take title to the hops, they still belong to A, and he may sell them or keep them as he pleases. If he keeps them he is entitled, of course, to any gain which comes from the price advancing after October 1st, and he must bear any loss consequent upon a further fall in price.

**417. The seller's right of lien.**—Even though title to the goods has passed to the buyer, and the risk of loss thereafter is upon him, the seller may have the right to hold them as security for the purchase price. This is called the seller's right of lien, and is a very important right. Whenever the sale is for cash this lien entitles the seller to retain possession of the goods until cash is paid. Even when the sale is upon credit, if the goods or any part of them remain in the seller's possession, after the term of credit expires, the right of lien entitles the seller to hold such goods until payment is made. Again, if goods are sold on credit, say of thirty days, and before the expiration of the credit period, the buyer becomes insolvent, the seller has a right to hold any of the goods remaining in his possession as security for the purchase price. Neither the insolvent buyer nor a purchaser from him, nor his assignee in

bankruptcy or insolvency, has a right to take the goods without paying what is due to the seller.

**418. Right of stoppage in transitu.** (a) **Its origin and nature.**—This is another important right of the seller against the goods, after their title has passed to the buyer. Like the right of lien, it originated in the custom of merchants, and has been adopted by the common law from the law merchant. By this right a seller, even after parting with the possession of the goods, may stop the common carrier from delivering them to the buyer, and thus regain his seller's lien. The conditions of exercising this right are these: The goods must be unpaid for in whole or in part; the buyer must be insolvent; the goods must be in the hands of a middleman, usually a common carrier, on their way from the seller to the buyer.

The object of this right, it will be noticed, is to protect the seller against the insolvency of the buyer, and to prevent the seller's property from being applied to the payment of the buyer's debts to other persons.

**419. (b) Insolvency in this connection.**—It is not necessary for the seller to show that the buyer has been adjudged a bankrupt or insolvent, nor that he has made an assignment for the benefit of his creditors, nor that he has failed in business. It is enough that the buyer has afforded the ordinary evidence of insolvency by his conduct in business; that he has let his commercial paper go to protest, or has suffered judgments to be taken against him without making any defense, or his property to be attached for debts, or the like. Any circumstances showing that the buyer can not pay his debts, as they come due in the regular course of business, will ordinarily justify the seller in treating him as insolvent.

**420. (c) How the right is exercised.**—The law does not require the unpaid seller to observe any particular form in exercising this right. The most that it requires him to

do is to give notice to the common carrier who has the goods not to deliver them to the buyer. He may also exercise it effectually by taking actual possession of the goods from the carrier, or from a warehouseman, or from any one else, before they have reached the possession of the buyer. If the goods are in the hands of a railroad or steamship company or other large carrier, notice of stoppage may be given either to the particular agent who happens to be in control of them, or to the company or principal through a general agent. In the latter case the company has a reasonable time in which to communicate the notice to its proper agent or servant.

421. (d) **The common carrier is bound to comply with the notice.**—If a common carrier or other middleman delivers the goods to the buyer after valid notice of stoppage *in transitu* has been given, he is guilty of wrong-doing against the unpaid seller, and may be compelled to pay him for them. In order to render the carrier thus liable, the notice must be a valid one—that is, it must have been made properly, and the seller's right to make it must not have been waived or lost.

The way in which he most frequently loses the right is by a transfer of the bill of lading for the goods. For example, X in New York sells and ships goods to Y in Chicago. When he delivers them to the carrier he takes a bill of lading—that is, a document by which the carrier acknowledges that he has received the goods, and promises to transport them to Chicago and there deliver them to Y or his assigns. This bill of lading is sent to Y. If he transfers it to a banker or other person, who takes it for value and in good faith, such transfer ends the unpaid seller's right to stop the goods. This is due to the fact that the common law following the law merchant treats a bill of lading as having some of the qualities of a negotiable instrument. Its transfer to a *bona fide* purchaser gives him

a better title to the goods represented by it than his transferor had. The moment a bill of lading is transferred to a purchaser for value and in good faith, he acquires all the rights he would have obtained had the goods reached their destination and then had been actually delivered by the original buyer to him.

422. **Right of resale.**—After the seller has regained his lien on the goods by stopping them, he is not bound to hold them indefinitely. The buyer, or his assignee in bankruptcy if he has become bankrupt, must pay for the goods within a reasonable time, or the seller may resell them. In bringing them to a resale he must act fairly toward the buyer. It is wise for him to give the buyer notice of the time and place of sale, so that the latter may have people there to bid and thus prevent the goods from selling for a song. If they sell for more than enough to pay the amount due to the seller and the expenses of the sale, the balance belongs to the buyer. If they sell for less, the seller has a claim against the buyer for the deficiency.

## § 6. REMEDIES OF THE BUYER

423. **Action to recover the goods.**—If the transaction is one of bargain and sale, or, although it was at first merely an agreement to sell, if title has subsequently passed to the buyer, he has a right to the goods themselves. It is true he must be ready to pay for them, unless the seller has agreed to give him credit as a condition of getting them; but as soon as he does pay or tender payment the seller must deliver the goods. If he refuses to, the buyer may bring an action to recover them or their value.

In some cases he is permitted to recover the very thing he contracted for, although title had not passed. Such an action is called one for "specific performance." It forces the seller to deliver the article itself, instead of paying dam-



ages for the breach of his contract. Cases of this sort are comparatively rare. Ordinarily the buyer can be fully compensated by a judgment for damages. When, however, such a judgment will not afford the buyer adequate remedy, he is entitled to a judgment compelling the seller to turn over to him the thing contracted for. Examples of this class of cases are the following: Contracts for the sale of a patent right, for the sale of a unique old altar-piece, for the sale of articles which can not be duplicated or the equivalent of which can not be obtained elsewhere, and the like.

**424. Action to recover damages.**—This is the remedy most frequently resorted to by the buyer when the seller refuses to perform his contract, or when he tenders goods which do not comply with the agreement. In such an action his damages, ordinarily, are the difference between the contract price of the goods and their market price at the time and place of their delivery. If there is no market price for them there, then the buyer must show what was their fair value.

At times he is entitled to recover in addition to the general damages, which we have just described, a sum by way of special damages. This is the case whenever the seller understands that a breach of his contract will naturally result in special loss to the buyer. When a retail dealer orders goods from a wholesaler, the latter knows full well that the former proposes to resell the goods at a profit. Accordingly, if the wholesaler fails to furnish the goods, and the retailer can not get them elsewhere in time for his trade, he may recover from the wholesaler not only the difference between the contract price and the market price, but such profits as he can show he would have made by retailing the goods.

**425. Extraordinary special damages.**—Not infrequently a seller is compelled to pay very large sums as special damages. This is illustrated by a recent case in New York.

The seller contracted to deliver a quantity of powder to the buyer in Cuba while that island belonged to Spain, and to procure proper permits from the Spanish Government for the landing of the powder. He failed to procure the permits, and when the powder was landed it was seized and confiscated by the Spanish officials, and the buyer was compelled to pay a large fine for having powder in his possession without the required permits. When the seller sued for the price of the powder the buyer denied liability therefor, and set up a claim against the seller for the fine which he had been forced to pay. The court decided in the buyer's favor, and gave him judgment against the seller for \$3,472.49—the amount of the fine—with interest from the date of its payment.

**426. For breach of warranty** the buyer has a claim for damages. If he has paid the price he may sue for the damages. If he has not paid it he may set up his claim by way of a partial defense to an action against him for the price. This is his only right in England and in many of our States, unless the seller was guilty of fraud in inducing him to buy. In some of our States, however, the courts give the buyer the same right to rescind a sale contract for an innocent warranty that they do for fraudulent representations.

**427. The measure of damages for a breach of warranty** is ordinarily the difference between the actual value of the article sold and its value if it had been such as it was warranted to be. In a recent English case a dealer in orchids sold a plant, warranting it to be a white orchid. When it flowered two years later it proved to be a purple orchid. Had it flowered white it would have been worth one hundred guineas, but as a purple orchid it was worth only seven shillings sixpence. The purchaser was entitled to the difference between those sums.

The buyer may be entitled to special damages for breach

of warranty, as the following case shows: The defendant contracted to supply plaintiff with a huge refrigerator, which would freeze and keep chickens for the following spring market. Plaintiff received the refrigerator and filled it with chickens. They did not keep for the spring market, but spoiled. When the defendant was sued for damages he insisted that he was liable only for the difference between the value of the refrigerator, had it worked as he warranted it would, and its value as it was. The court held that such would have been the measure of damages had the plaintiff not lost anything by using it. But as the defendant knew that plaintiff was intending to use it for keeping chickens, he was liable in special damages for the market price of the chickens in the spring (which was shown to be forty cents a pound), less the cost of getting them to the market, including freight and charges for selling them.

## APPENDIX

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### PAGE 34, NOTE 1.

Although an entirely satisfactory definition of tort has not been formulated, it may be fairly described as "a breach of duty imposed by municipal law for which a private action for damages can be sustained." It is to be distinguished from a breach of contract on the one hand, and from a crime, or breach of duty to the State, on the other. A person who breaks his contract, without excuse, wrongs the other party to the contract, but he does not commit a tort, for the duty which he violates is one that was imposed upon him by his agreement. The duty violated by an act or omission which amounts to a tort is a duty imposed by a rule of law. Typical instances of tort are assault and battery, false imprisonment, trespassing upon real estate, or converting to one's use the personal property of another.

At times the law imposes upon a party to a contract a duty very similar to that which the contract imposes. An innkeeper or a common carrier is an example. When such a party breaks his contract he also breaks his legal duty, and may be sued either for his breach of contract or for his tort.

Some acts are crimes as well as torts. A person who attacks and injures another without lawful excuse or justification, is liable to a private action in tort for damages to the one injured, and is also liable to public prosecution by the State for the crime of assault and battery.

### PAGE 130, NOTE 1.

Perhaps this statement needs some elucidation. A promises to let B use his horse for a day without compensation. There is no contract for a bailment of the horse, because B furnishes no consideration for A's promise. If, however, B, in return for A's promise and at his request, promises to be absolutely responsible for the safety of the horse while in his possession, no matter what accident may befall the beast, he assumes a liability which the law did not impose upon him—he sustains a detriment—and thus furnishes a consideration for A's promise. The parties have made a binding contract for a bailment.

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